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2515

No. 11841

United States
Circuit Court of Appeals
for the Ninth Circuit

Cert. 2514

ED DE BON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

Typo Press, 398 Pacific, San Francisco 8-16-48—60

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In the Southern Division of the United States District Court for the Northern District of California

Before Hon. George B. Harris, Judge.

No. 30,881-H

UNITED STATES OF AMERICA,

vs.

ED De BON,

Defendant.

REPORTER'S TRANSCRIPT OF RECORD

July 31, 1947

Mr. Bonsall: Ladies and gentlemen of the jury, as the court said, you have listened to the evidence in this case; you have listened patiently. The grand jury of this district returns an indictment against three defendants, John Stephen Hildebrand, Oscar Csaki, and Ed De Bon. The only defendant before you for your consideration, of course, is Ed De Bon. After the Grand Jury returns an indictment, it is the duty of the United States Attorney's office to proceed with the prosecution of the charge against the defendant. Our office has endeavored to do that. After we have presented the case to you and the defendant has had his day in court, represented by counsel, and you have heard the Government witnesses, then it becomes your exclusive prerogative to pass upon the facts [1*] of the case, to de-

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

termine if, from all the facts, the Government has made out a case.

I want to request you, in considering this case, to strike out of your minds any testimony that the court may have ruled out, and to listen to any admonition that may have been given by the court in the course of the trial.

Now, there are in this indictment three counts. The first count charges that the defendants, Ed De Bon, John Stephen Hildebrand, and Oscar Csaki, conspired among themselves that during a period between March 27, 1946 and up until the time of the conclusion of the conspiracy, somewhere after the date when the automobiles involved in this charge were delivered into the custody and ownership of De Bon, in that De Bon, who was not a veteran and who desired to purchase certain surplus property from the War Assets Administration, conspired with Hildebrand to secure a—to perpetrate a fraud on the United States by securing surplus property in a way that was not authorized under the regulations and the law, to-wit, to secure property on priorities of veterans which he was not authorized to receive.

It is our contention that Mr. De Bon entered this conspiracy on or about July 8, 1946. You will recall that at that time there was a meeting of De Bon and Hildebrand at 30 Van Ness Avenue, I believe it was, in San Francisco, at which time there was being offered for sale certain trucks, among [2] them being two Chevrolet trucks, and three White trucks. The testimony of both Mr. Hildebrand and

I believe the defendant De Bon is that he was there at that time and place. There is some slight difference as to what occurred there, but it seems that De Bon was there to get certain automobiles if possible. That is a foregone conclusion, and these two—the surplus property covered in these charges was advertised in two brochures, one Exhibit No. 11, entitled, "Veterans' Trucks Trailers for Sale June 25, 26," bearing clearly on its face the title **"Veterans," and which** sale was confined exclusively to veterans, according to the testimony of the War Assets Administration officer here.

Now, this particular sale, as I stated, had been advertised for June 25 and June 26, 1946, and Mr. De Bon entered this conspiracy, I claim, on July 8, 1946.

Now, if you will recall the testimony of the War Assets Administration official, Mr. Chambers, he stated that this sale had been completed, but there were some left-over articles, among them being these two Chevrolet trucks, and that they could be purchased by veterans by making a mail order application for those trucks. Hildebrand on that same day did make a mail order request for the purchase of these two trucks, one, as he states, using the preference of the veteran, Csaki, and the other using the preference or priority of his own.

Now, both these trucks ultimately reached the hands of [3] Mr. De Bon. He got the bill of sale for them.

During—at the same time—but before I go on, I want to mention this, that some confusion has

resulted between the reference sometimes to one Chevrolet truck and at others to two Chevrolet trucks. Now, there were the two, one purchased on Hildebrand's priority and the other purchased, as we charge on Csaki's priority; and we have in this case confined ourselves to the operations between Csaki, Hildebrand, and DeBon. There may have been other conspiracies here—

Mr. Tramutolo: Just a moment. Your Honor, I object to that statement of counsel and assign it as misconduct, to say there are other conspiracies, because there is a case in point just recently that you must confine yourself to the charge in this indictment. I assign the remark as misconduct.

The Court: I instruct the jury to disregard that phase of the argument of Mr. Bonsall having to do with other alleged conspiracies than the one charged in this case.

Mr. Bonsall: What I had in mind, ladies and gentlemen, was to confine you to the facts in this case, the one Chevrolet truck and the three White trucks, and not to consider any other trucks in relation to the matter. That is what I am trying to get at.

Now, at the same time and place Hildebrand said he had a further conversation with DeBon regarding the use of priorities for the purchase of the three White trucks. Those White trucks [4] were advertised in a brochure, Government's Exhibit No. 12, "Trucks over 2¾ tons and truck tractors," being advertised by the War Assets Administration, and the dates of the sale appearing on the adver-

tisement state that these trucks were available in the following order: From June 3rd to June 17th for Federal agencies; from June 24th to July 12th, for veterans of World War II.

Now, Mr. DeBon says there were several trucks that he could use here if they could be procured.

Now, mind you, the sale of these trucks hadn't come off at the time Mr. DeBon was talking in relation to these trucks. It was a future sale, a sale to take place subsequently to July 12th, and which did actually take place on July 24th or thereabouts.

Now, Mr. Hildebrand says that they discussed these three trucks and this Chevrolet, and in the course of their discussion they consulted pamphlets similar to those which were either on the table or brought in by Mr. DeBon, and that they looked at the exact page where these trucks appeared and obtained the tag and numbers of the trucks, and put in these mail order requests for the purchase of the property, including the three White trucks.

Now, where does this conspiracy come in? All right, we have here Mr. DeBon desiring to get some Government property. He is a dealer in automobiles. He has been in the automobile [5] business up in Eureka for many years. He states that he is familiar with the way the automobile business is conducted; he is familiar with the way in which War Assets property is purchased. He said he had a tremendous credit with the War Assets Administration in the way of purchasing property, so that he was familiar with the way in which this prop-

erty could be purchased, and he therefore knew that he couldn't make the purchase of this Chevrolet truck in the time and manner in which he did, that he couldn't make the purchase of the three White trucks at the time and in the manner that he did. He must have realized that he needed some priorities in order to purchase this property, and, by the way, it seems to me that in obtaining those priorities he kind of shot the gun on other dealers, who probably didn't avail themselves of the same means of making these purchases as the defendant DeBon.

Well, they needed some priorities, and where were they to get them? Well, let's see. Along about December 11, 1945, Oscar Csaki had made an application for a Veteran's Application to Purchase Surplus Property from War Assets Administration. That is in evidence here. It is significant that he states that no property was purchased on that application, that his priorities were not used. Why wasn't it used? Hildebrand says that Csaki told him that he had no use for the property in subsequent applications. He didn't use the first one, not a single item. The second one, according to the testimony, [6] Csaki said, "I don't think we better make this application. I have no use for the property. I am not in business. In fact, it may get us in trouble." Both Hildebrand and Csaki testified to that in substance.

Well, along about the 23rd of March 194—the 27th of March, 1946, Hildebrand prepared a request to purchase surplus property for Csaki. Part of that application was filled in by Hildebrand, according to the testimony, and the other part by Csaki. In fact, all the essential parts were filled

in by Hildebrand, who stated just what property they wanted. Csaki signed it and took it over to the certifying officer, received his priorities, some pink slips, a pink slip for each article that authorized him to buy each article if available and he wanted it; and what does he do with those pink slips? He puts those pink slips in the possession of Hildebrand. Hildebrand had those pink slips at the time DeBon was with him there and at the time he says they consulted that catalogue on the 8th day of July, 1946.

Now, the conspiracy works this way: They need Csaki's priorities. Hildebrand said these priorities of his own had been exhausted, or he couldn't use them for some reason, and he needed priorities. They needed Mr. Hildebrand as the engineer of the scheme, and the transition is this way, from Csaki to Hildebrand, from Hildebrand to DeBon.

Now, having in mind that we start with this premise, [7] that the priorities are there, the catalogs are there, the possibility of the selection of these articles by DeBon, we conclude with this fact, that the property DeBon wanted to get into his possession after their sales, isn't it fair to assume that when he discussed this matter with Hildebrand he said, "I want this item; I want that item;" or do you suppose he left it up to Hildebrand to pick out any old item and send it to him? No, one of the significant things is that those trucks got into his possession. He didn't say, "These are not the ones I wanted," but he took them all without complaint.

Now, when he took title to these trucks, what kind of documents did he get? What kind of documents did he get? I said I would keep to the four trucks in question, so I am only going to refer to the documents on the four trucks. In each case he got a bill of sale from Csaki to himself. When he took these bills of sale, there is nothing to indicate that he made any complaint or asked how he was taking title from Csaki when he had been dealing with Hildebrand.

Now, on the occasion when he took title to the three trucks, we have these people present at that time: Csaki, Hildebrand and DeBon. DeBon was present and saw the transfer of all these papers transfering the title into his name, executed almost instantaneously, simultaneously. Now, you say, "Is there any money angle involved here?" There are so many different angles from which we can discuss this case. Is there any money angle involved here? Yes, there is, Hildebrand testifies that on the two Chevrolet trucks, only one of which I am speaking about, he received $50, $50 on each, and that was the agreement with DeBon, that he would be paid that money. Hildebrand testifies that when he saw DeBon on July 8, 1946, DeBon agreed to pay him $200 for each truck that he was able to get him, each White truck.

Now, you will bear in mind that the request to purchase went in for number of trucks as might be allocated. They didn't know how many they would get, but they got three, and he was paid for those three trucks.

When was payment made? Payment was made,

of course, when the title to the trucks was placed in DeBon, the payment for the Chevrolet trucks being made, I believe, on July 9, 1946. Hildebrand testified that he received the $50, and that he paid of that sum some $20 or $25 to Csaki.

The $200 which was to be paid for each of the three White trucks by DeBon was not paid in full, according to Hildebrand's testimony. Hildebrand says that he only received $400. That $400 was in cash, quite a large amount of money to be represented in a cash transaction of this kind, but he says it was in cash, and was paid to him in an automobile after the title to these cars had been transferred to DeBon, or while they were in the course of transfer. It is strange indeed that the final payment for the three White trucks was represented [9] by three cashier's checks, all dated July 24, 1946, and in sequence, serial numbers 2818881—Well, it starts with 80—2818880, 2818881, and 2818882, and that following that and on the same date there is a cashier's check dated, or numbered, 2818883, the next number, for $500, made payable to the order of the defendant Ed DeBon, and endorsed "Paid"—endorsed by DeBon and paid July 24, 1946. Why did he draw this check, this cashier's check, payable to himself, for $500, on the same day, unless he had some particular use for that $500? Isn't it fair to assume that this—if this was a legitimate transaction—I am now referring to the handling of the payment of this $400 to Hildebrand—if this was a bona fide transaction, that the payment of that large amount would have been made

by a check of some kind made payable directly to Hildebrand. Here is a man engaged in business; he keeps books and records. I doubt very much if he is continually paying out $500 in cash without getting a receipt, or paying it by check, or something.

Gentlemen, I believe this check—and DeBon says so—was used to get the $500 or $400 to be paid to Hildebrand that day. He went out of his way to get this check. He did not want it to appear, in other words, that he was paying this money to Mr. Hildebrand, so he had this check to account for it, and got the money himself and passed it on. It would have been just as easy to pay by check or to have received a receipt.

Now, while we are on this money subject, there seems to be [10] some discrepancy about the amount of money involved. Of the $400 covering the purchase of the last three trucks on these priorities, according to Hildebrand and Csaki, about $120 was paid to him, all those payments in cash, none of them by check. Now, do you suppose that Mr. DeBon paid the $570 or $580 that he says he did for these trucks? I don't know whether he did or not. He testifies that he paid $580. He testifies that he paid a large sum of money; he testifies that he paid a large sum of money, whether we take it as $580 or $400. He testifies also, I believe, that there was a check of $150. Hildebrand says there was no check. I doubt if there was a check, because there seems to be a studied plan to avoid any check, but he says there was a check.

I was very much interested in the testimony of Mr. DeBon on the stand. He testified that he had paid this $580 in cash. He says he carried a large amount of cash with him and therefore he paid it in cash, but if my theory is correct, with all the money he was carrying around, he went out of his way to get a check and then used the cash for the payment; but I asked DeBon about certain statements that he made to an agent of the FBI along in February, 1947. While he was on the stand I asked him if he recognized it—recognized the agent, and he said he did. I then asked him if he hadn't made the statement to this agent that he hadn't paid anything at all to these men for these trucks, and he said, "No, I said that I paid [11] them some small amount for their expenses in going to examine these trucks, that these trucks were at Stockton and Sacramento, and I paid them not exceeding $150 in all." At first I think he said a hundred dollars. And he said further that he thought he bought two of those trucks from Csaki and two from Hildebrand. He told the agent—I don't know whether he told the truth or not—that he met Csaki in a restaurant early in the spring of 1946, and that he met Hildebrand at a service station in the spring of 1946. Of course, I don't know whether that is true, or not.

Now, we examine the whole transaction. It shows an intent on the part of Mr. DeBon to get some property that he wasn't entitled to, using—and there must be a pre-arranged agreement between the people. Now, that agreement doesn't have to be

on the form of writing. I think his Honor will tell you you can spell out that agreement from the facts in the case, in other words, by what the people did. In other words, in this whole case I think the axiom, "Actions speak louder than words" is very applicable.

Now, the second and third counts deal with the substantive offense of fraud. The second count charges that on July 4, 1946, as far as DeBon is concerned, that he caused to be executed a request for a priority in the name of Csaki to be used for the purchase of automobiles from the War Assets Administration or the War Assets Corporation, intending all the time that he was [12] to get title to that property. That particular property was the one Chevrolet that is mentioned in the second count.

The third count charges the same facts, but relating to the three White trucks. In other words we charge that Mr. DeBon, with the intent to defraud the United States, secured or caused to be executed this request, or aided or instigated the execution of this form, requesting the purchase of these three White trucks in the name of Csaki, intending all the time that Csaki was not to be the purchaser, but himself.

I again call your attention and invite your attention to the fact that on July 8th the sale had not occurred. It was a future sale. Hildebrand didn't have the property at that time, and when title was passed, it was a simultaneous transaction.

Just in closing and passing along, I was impressed with the testimony of the Agent Dillon. It seems to me to be frank, direct, positive, time and

place, who was present, what time of day it was, just exactly as to what was said, and I was particularly impressed with the fact, with his testimony as to how the statements of Mr. DeBon changed.

Before I go on, it was significant that he wasn't anxious to make a statement at all, but the agent comes in and tells him he is making an investigation of this and he would like to see his books and records. Well, ordinarily when a business man is approached by an agency of the Government, he doesn't object if everything is all right to making any statement. [13] I think many of us have made statements at one time or another for the Government. We didn't have to make them, it is true, but when everything is all right we are usually willing to make them. But here is Mr. DeBon saying at first, "I paid nothing to these men;" then saying, "I paid their expenses"; then saying that he didn't in any event pay more than $150, when all—when on the stand himself he testified positively that he had paid the sum of $580 for these cars.

Now, you may regard Mr. DeBon as a truthful man. You heard what he said. You saw his demeanor. You have heard all the facts in the case.

I didn't intend to talk as long as I have, but time does pass so rapidly—you heard all the facts; you heard the scheme of operations; you are businessmen and women and of good judgment. Knowing these facts, I will leave our case in your hands as far as the opening is concerned.

[Endorsed]: Filed April 9, 1948. [14]

[Endorsed]: No. 11841. United States Circuit Court of Appeals for the Ninth Circuit. Ed De Bon, Appellant, vs. United States of America, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed June 10, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11841

ED DE BON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STIPULATION AND ORDER THAT OMITTED PART OF RECORD, REQUIRED BY PRAECIPE, BE ADDED TO PRINTED TRANSCRIPT OF RECORD

Whereas the stipulation and praecipe filed in the court below on Jan. 12, 1948, (R.27-28) required the inclusion in the transcript of record on appeal

herein the reporter's transcript of the prosecution's opening statement to the jury, and, whereas by inadvertence, the same was omitted from the printed record herein,

It is stipulated that the same may be printed and added to the said transcript of record on appeal.

Dated June 3, 1948.

/s/ FRANK J. HENNESSY,
U. S. Attorney,
Attorney for Appellee.

/s/ CHAUNCEY TRAMUTOLO,
Attorney for Appellant.

So Ordered: June 3, 1948.

/s/ FRANCIS K. GARRECHT,
United States Circuit Judge
Presiding.

[Endorsed]: Filed June 3, 1948. Paul P. O'Brien, Clerk.

No. 11841

United States
Court of Appeals
for the Ninth Circuit

ED DE BON,

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vs.

UNITED STATES OF AMERICA,

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Appeal from the United States District Court
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Typo Press, 398 Pacific, San Francisco 12-3-48—60

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In the Southern Division of the United States District Court for the Northern District of California

Before Honorable George B. Harris, Judge.
No. 30881-H

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ED DeBON,

Defendant.

Tuesday, July 29, 1947

Appearances: For the United States: Edgar Bonsall, Esq., Assistant United States Attorney. For the Defendant Chauncey Tramutolo, Esq., [1*]

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* Page numbering appearing at foot of page of original certified Reporter's Transcript.

FRANK A. CHAMBERS

called as a witness on behalf of the United States, sworn.

The Clerk: Q. Will you state your full name to the Court and jury?

The Witness: Frank A. Chambers.

Direct Examination

Mr. Bonsall: Q. What is your occupation, Mr. Chambers?

A. I am Chief of the Veterans Branch of the Priorities Division of the War Assets Administration.

Q. Were you formerly employed by the War Assets Corporation? A. I was.

Q. The War Assets Corporation is now the War Assets Administration, is that so?

A. That's correct.

Q. When did that change take place?

A. That change took place, I believe, on March the 26th, 1946.

Q. How long had you been in the employ of the War Assets Corporation.

A. Well, from its inception. The War Assets Corporation was the predecessor to the War Assets Administration, and prior to that the Smaller War Plants Corporation was the predecessor to that. I was with the agency from January 1946 to the present time.

Q. What are your duties?

A. As Chief of the Veterans Division, I am responsible for the [2] regulations, the administra-

(Testimony of Frank A. Chambers.)

tion of priorities, the issuance of priorities to veterans.

Q. Would that include the issuance of priorities to veterans for motor vehicles?

A. That would include that, yes, sir.

Q. Now, will you explain to the Court and jury what you mean by veterans' priorities?

A. Well, Congress, when the Surplus Property Act was passed, extended to veterans of World War II a special privilege for the purchase of surplus commodities. This privilege or priority was extended to other special groups also, and a system of priorities or sequence of priorities was established by Congress when the Act was passed.

Q. Will you explain that sequence of priorities in so far as this related to veterans of World War II?

A. Well, the veterans of World War II are extended a priority sequence in No. 2 place. They are preceded only by the Federal Government. The Federal Government has the top priority. The veterans of World War II are in second place in the purchase of surplus commodities.

Q. Will you state to the Court and jury what advantages there are to the holders of veterans' priorities under that priority system?

Mr. Tramutolo: Just a moment. To which we object, if your Honor please, that it is interpretation by an administrative [3] officer. That is a matter of law.

The Court: Sustained.

(Testimony of Frank A. Chambers.)

Mr. Bonsall: Withdraw it.

The Court: Objection sustained.

Mr. Bonsall: Q. Will you explain the method by which veterans obtain priorities, the mechanical procedure they go through to obtain a priority?

A. A veteran, in order to secure a priority, must make formal application. That application form is form No. 66. On this application the veteran must show the nature—

Mr. Tramutolo: Just a moment, Mr. Chambers. If your Honor please, that calls for interpretation of the document itself.

The Court: This is merely a procedural outline. The witness may testify to the procedure.

Mr. Tramutolo: I will withdraw the objection if that is the purpose.

Mr. Bonsall: Q. Proceed with your reply.

A. The veteran must make application on form 66, in which he outlines the nature of his business and the commodities and dollar amount of surplus he requests. That application then is turned over or taken by him to an interviewer, who screens the application and also checks when the veteran on some proof that the applicant or that the man requesting the surplus is a veteran of World War II. He looks at discharge papers or any other [4] required proof. He ascertains primarily that the items requested are necessary in the particular type business and that the amount requested is commensurate with the size of the enterprise, and required by regulations. If found approvable, the

(Testimony of Frank A. Chambers.)

interviewer will approve such application. It is then turned over to typists, where form 63, or the pink slip, is issued to the veteran. This form 63 or pink slip the veteran retains in his possession, and it is his proof and indication that he has met the qualification for veterans' priority.

Q. Now, you have different types of sales, have you not? A. That's correct.

Q. What different types of sales do you hold?

A. Well, in general, there are two major types of sales. There is the type sale that is extended to all priority holders in sequence. That is the sale where material is offered and specific dates set for all priority purchases. That would include the Federal Government, the World War II veterans, the RFC, Small Business; then you have the State and Counties and municipalities, non-profit institutions and subsequently that material will be offered to the general public if there is any residue.

Q. Well, you had two types of sales as regards point of time, did you not?

A. That's correct.

Q. What are those two types of sales? [5]

A. Well, there is generally the sale to priority holders as outlined, and the other sale would be the so-called set-aside sale. That would be the sale only to veterans of World War II.

Q. As an employee of the War Assets Administration, do you have the joint custody of their records? A. I do.

Q. You were asked to produce here today the

(Testimony of Frank A. Chambers.)

record of the sale of a Chevrolet truck to Oscar Csaki. Do you have that record with you?

A. I believe I do.

Q. Are all of the papers in relation to this sale of the Chevrolet truck to Oscar Csaki contained in that particular folder?

A. I have in a folder—I have the papers of the consummation of the sale, but in conjunction I also have the preceding documents of the application.

Q. What I mean to say, do you have two separate folders, one for three White trucks sold to Mr. Csaki? A. That's correct.

Q. And one for the Chevrolet?

A. That's correct.

Q. Now, what documents appear in this folder regarding the sale of the Chevrolet to Mr. Csaki? Will you give them in their order?

A. Well, certification having been obtained, the veteran Csaki [6] made out a mail order request for surplus property dated July the 8th for one Chevrolet truck.

Q. I notice that this is form WAASF29, dated July 8, 1946, and is addressed to the Chief, Veterans Preference Unit, War Assets Administration, 1540 Market Street, San Francisco 2, California. "If available, I desire to purchase: 1. Indicate number, the items listed below in order of my preference and offered at sale number 45378, whose sale date is"—July, is that?, 25, 1946—or is that June? A. That is June.

Q. Can you identify that sale number 45378?

(Testimony of Frank A. Chambers.)

A. I think I have the original brochure here of sale 45378, which is a sale of trucks and trailers, a set-aside of trucks and trailers, that began on June 25.

Q. And was limited to veterans only, is that correct? A. That's correct.

Q. I notice further here the joint sequence War AA Declaration No. CRO, file number 56296; what does that represent?

A. That represents the specific vehicle as listed in the catalogue.

Q. Have you located it in the catalogue?

A. The tag number here is No. 81.

Q. Tag No. 81, item No. 289, page No. 26, price $1,125.96.

A. What is the item number? Item No. 289?81, tag number 81, 1942 4x4 model G7013, ton and a half Chevrolet. [7]

Q. I notice here the name of—

A. This is a residual item, it wasn't entered at the time of the original allegation.

Mr. Tramutolo: Now, then, if your Honor please, if that is not the original and there are any notations on there—

The Court: You mentioned one residual item?

The Witness: This item was a residual item that was bought after the sale was opened and the original allocation made. A set-aside sale is only to veterans on a specific date. On the orders received on that date the allocation is made and any residual is retained by the Section, the Automotive

(Testimony of Frank A. Chambers.)

Section, and sold over the counter to any qualified World War II veteran.

Mr. Bonsall: Q. Sold from the catalogue by identification as to catalogue tag number and page?

A. That's right.

The Court: Objection overruled.

Mr. Bonsall: "I hereby certify that I have personally inspected the aforesaid items as listed and understand that all purchases are on 'as is and where is' basis without recourse. I am prepared to make payment upon notification of award and request for payment."

It purported to be signed by one Oscar Csaki by J. S. H., I guess it is.

Q. You don't know that signature, of course?

A. I do not.

Q. Now, I notice at the bottom of this form S35617, C28617; do those numerals have any significance?

A. I am not aware of their significance.

Mr. Bonsall: All right. Down in the lefthand corner, "Oscar Csaki, 75 Roderick Street, San Francisco." I ask that this be marked for identification.

The Court: So ordered. Government's No. 1 for identification.

Gentlemen, we have reached the noon hour. We will take the noon adjournment promptly at 12:00 o'clock and reassemble promptly at 2:00 o'clock. It may be during the noon hour you can, with re-

(Testimony of Frank A. Chambers.)

spect to documentary proof, go over these matters if so advised, Mr. Bonsall.

Mr. Tramutolo: And stipulate what may be introduced. I will be very glad to do that.

The Court: And disputed items, we will hear them out.

Mr. Tramutolo: I am entirely in accord with that.

The Court: Perhaps we can eliminate about half our trial time.

Ladies and gentlemen of the jury, we are about to adjourn for the noon recess. Please bear in mind the usual admonition of the Court not to discuss this case among yourselves or suffer or permit anyone to discuss it with you until it is finally submitted to you.

We will now take the noon recess. [9]

Afternoon Session

Tuesday, July 29, 1947—2:00

The Clerk: United States of America vs. Ed DeBon, on trial.

Mr. Tramutolo: Ready, your Honor.

Mr. Bonsall: Ready, your Honor.

The Court: You may proceed, gentlemen. It is stipulated the jurors are all present?

Mr. Bonsall: So stipulated.

Mr. Tramutolo: Yes, your Honor.

The Court: Proceed.

Mr. Bonsall: Mr. Chambers.

The Court: Have you narrowed the exhibits to a point where we can save time?

(Testimony of Frank A. Chambers.)

Mr. Bonsall: I think so, your Honor. I will have to have them identified, of course. I think we stipulated to what exhibits could be introduced. If I am in error, counsel will correct me.

The Clerk: The witness on the stand is Frank A. Chambers, previously sworn.

Mr. Bonsall: Could we have a stipulation, Mr. Tramutolo, that the records of the Chevrolet truck now in possession of this witness relate to the truck charged in the indictment?

Mr. Tramutolo: Well, if you say they do, I will stipulate.

Mr. Bonsall: Well, they do. Will you so stipulate? [10] Will you further stipulate that the records in the possession of this witness as to the three White trucks relate to the three White trucks the subject of this indictment?

Mr. Tramutolo: If the witness testifies that is so, I will so stipulate, your Honor.

I take it you would, Mr. Chambers?

The Witness: That is correct.

Mr. Tramutolo: I will so stipulate.

Mr. Bonsall: Q. Mr. Chambers, you have the folder relating to the Chevrolet truck purchased by Mr. Csaki; will you identify the records in that folder in their order?

A. Well, the remaining documents—

Q. No. 1 has been introduced.

A. Introduced, it was the offer to purchase by the veteran.

Q. An offer to purchase?

(Testimony of Frank A. Chambers.)

A. The offer to purchase when acceptable, puts the machinery in operation that creates an invoice that is typed identifying the specific truck. This invoice or sales document was made out on July 8, 1946 and refers to a ton and a half Chevrolet truck. It is described in the document. This was also paid for on July 9, 1946. Payment was made to the cashier in the Regional Office of the War Assets Administration.

Q. Is there an endorsement on the back of that form?

A. There is an endorsement here showing that the item was purchased under veterans' preference, it is so stipulated, as [11] signed Oscar Csaki.

Mr. Bonsall: I ask that this be marked at this time for identification as the exhibit next in order.

The Court: So ordered.

The Clerk: Government's Exhibit No. 2 for identification.

(Thereupon the form in question was marked United States Exhibit No. 2 for identification.)

The Witness: I have another document here which is a copy of the original sales invoice just submitted. This copy is the blue copy, or sales copy, which is turned over to the veteran at the time of the purchase and enables him to secure the property at the place at which the property is located, and it is surrendered to the custodian at the place.

Mr. Bonsall: Q. Does that relate to the same truck as the preceding documents?

(Testimony of Frank A. Chambers.)

A. It does.

Mr. Bonsall: I ask that this be marked for identification as Government's exhibit next in order.

The Court: So ordered.

The Clerk: Government's Exhibit 3 for identification.

(Thereupon the blue copy of sales invoice in question was marked United States Exhibit No. 3 for identification.)

The Witness: The remaining documents pertaining to the Chevrolet ton and a half is a copy of the bill of sale issued to Oscar Csaki for the purchase of that. [12]

Mr. Bonsall: Q. Does that show motor number and description of the truck? A. It does.

Q. What is the motor number?

A. Chevrolet name engine BV488492, serial number 9E22-4254. Body type, serial E5, Gunnery trainer, manufactured in the year 1942, model No. G7013.

Q. And what is the date of that bill of sale?

A. It was signed July 8, 1946.

Mr. Bonsall: I ask that this be marked in evidence as Government's exhibit for identification.

The Court: So ordered.

The Clerk: Government's Exhibit 4 for identification.

(The bill of sale in question was thereupon marked Government's Exhibit No. 4 for identification.)

(Testimony of Frank A. Chambers.)

Mr. Bonsall: Q. Mr. Chambers, have you a folder relating to the purchase of three White trucks by a man by the name of Csaki?

A. I have.

Q. Do you have that folder? A. I do.

Q. What documents are in that folder relating to the sale of these three trucks?

A. Mail order request for the purchase of surplus property, form SF29, date 7-8—July 8, 1946, relates to sale No. [13] 45468, which sale date was July 12. It was a request for three trucks and was signed by Oscar Csaki.

Q. Can you identify this particular sale, sale No. 45468 on July the 12th?

A. I have the catalogue or brochure for sale number 45468 here in my possession.

Q. And can you find the three trucks, War Assets Administration 16,300, 16,301, and type No. 614—617—and 540 in that brochure?

A. Type No. 614, 617 and 540, I can.

Mr. Bonsall: I ask that this be marked Government's Exhibit next in order for identification.

The Court: So ordered.

The Clerk: Government's Exhibit No. 5 for identification.

(Catalogue for sale number 45468 referred to was thereupon marked Government's Exhibit No. 5 for identification.)

The Court: What are the documents you have in addition supplemental to that?

The Witness: In addition to the request for the

(Testimony of Frank A. Chambers.)

purchase, I have here veteran's preference certificate, form No. 63, or the pink slip.

The Court: Is that issued in each instance?

The Witness: That is issued in each instance.

The Court: That is a condition precedent to delivery, is it? [14]

The Witness: This is a form that is issued as a result of the application.

The Court: All right.

The Witness: Which the veteran retains.

The Court: You have examined those documents, counsel?

Mr. Tramutolo: Yes.

The Court: All right, proceed.

The Witness: This must be turned in when the order is filed or prior to the consummation of the sale. The certificate here indicates on the back that the three White trucks, tags 614, 617 and 540, were sold in sale 45468 on July 12, 1946.

The Court: Sold to whom?

The Witness: To the veteran Oscar Csaki on the face of it.

Mr. Bonsall: All right.

The Court: Next in order for identification.

Mr. Bonsall: Next in order for identification.

The Clerk: Government's Exhibit 6 for identification.

(Form No. 63, pink slip, referred to was thereupon marked United States Exhibit No. 6 for identification.)

The Witness: I have then a form WAASF-22,

(Testimony of Frank A. Chambers.)

which is the report of an award on these three trucks to veteran Oscar Csaki. It indicates to the Sales Section that they are to prepare the necessary sales documents.

Mr. Bonsall: Q. And what is the date of that?

A. The date of this is July 13, 1946. It also shows that the veteran had been notified of his award.

Mr. Bonsall: I ask that this be marked Government's exhibit next in order for identification.

The Court: So ordered.

The Clerk: Government's Exhibit No. 7 for identification.

(Form WAASF-22, report of award of three trucks, was thereupon marked United States Exhibit No. 7 for identification.)

The Witness: I next have three sales documents or invoices, one for each of these three White trucks. The dates on these are July 17, 1946. They describe these trucks and show the amount of money due the Government for them. They further show that payment was made to the cashier in the Regional Office on July 24, 1946.

Mr. Bonsall: I ask that these be marked as one exhibit for identification.

The Court: So ordered, as one exhibit.

The Clerk: They are marked Government's Exhibit 8 for identification.

(Sales documents for three White trucks were thereupon marked United States Exhibit No. 8 for identification.)

(Testimony of Frank A. Chambers.)

The Witness: Then we have the three blue copies for the same transaction, sales documents, blue copy of the sales documents, the same transaction; they are dated July 17, 1946, and show that they were paid for on July 24, 1946. [16]

Mr. Bonsall: Q. By the way, where do those blue copies—how do they reach your file?

A. These are turned over to the veteran at the time he makes payment for the trucks, and he takes this document to the place where the truck is located, picks up his truck and turns over this document to the custodian at the field, who in turn then routes them back to our files so we know that the transaction has been completed.

Mr. Bonsall: I ask that these three documents be marked as one exhibit in evidence—pardon me, your Honor, just a moment.

The Court: You might indicate that on these delivery receipts they appear to be signed by Oscar Csaki by Jack—

The Witness: Jack Payne.

The Court: Jack Payne?

The Witness: That is correct.

Mr. Bonsall: I ask that they be marked as one exhibit for identifiaction.

The Court: Next in order, Government's Exhibit for identifiaction.

The Clerk: Marked Government's Exhibit 9 for identification.

(Delivery receipts in question were thereupon marked United States Exhibit No. 9 for identification.)

(Testimony of Frank A. Chambers.)

The Witness: Then I have copies of the bill of sale for [17] these three White trucks dated July 17th, 1946.

Mr. Bonsall: Q. Now, will you furnish the engine and motor number and description of those three White trucks?

Mr. Tramutolo: I will stipulate to it.

Mr. Bonsall: I want it in the record, if you please. I would like it in the record.

A. The first here is White truck—this is type No. 540—it is a White truck, engine No. HXC-324938, serial number 250526, body type, van truck, year manufactured 1942, model No. 666.

Then I have a bill of sale for item—

Mr. Bonsall: Q. Copy of the bill of sale?

A. Copy of the bill for sale for item No. Tag 617. The make is White truck, engine No. HXC-326143, serial number 251062, body type van, year manufactured 1942, model No. is 666.

Then I have a copy of the bill of sale for item No. Tag 614. The make is White, engine No. HXC-326565, serial number 251197, body type van, year manufactured 1942, and model number 666.

Mr. Bonsall: Now, you had one yellow brochure there this morning. I will ask that these be marked as Government's exhibit next in order for identification.

The Court: So ordered.

The Clerk: Government's Exhibit 10 for identification.

(Three copies of bills of sale in question

(Testimony of Frank A. Chambers.)

were thereupon marked United States Exhibit No. 10 for identification.) [18]

Mr. Bonsall: Q. I show you this document, marked "Veterans trucks and trailers for sale June 25 and 26, San Francisco, Masonic Hall, 25 Van Ness Avenue," and other marks on the War Assets Administration, and ask you what this brochure is.

A. This is a brochure for a veteran's set-aside sale, sale number 45378. This set-aside sale was opened on June the 25th and continued until all property was sold to veterans.

Q. Was all property under that sale limited to veterans?

A. Below the property on the set-aside list, "to be sold to no one other than veterans of World War II."

Q. That is the brochure that shows this Chevrolet truck regarding which you have testified?

A. That is correct.

Q. Now, I notice in the brochure names written in in pencil. What do they represent?

Q. On the original date of the sale, which is June 25-26, as shown here, those veterans who had filed orders for the purchase of property, in the allocation of those requests an entry was made at the time they were allocated to indicate that the individual veteran named there shown had received an award.

Q. That is the official office record of that allocation? A. That is correct.

Q. From your files?

(Testimony of Frank A. Chambers.)

A. That is correct. It is the master file copy retained by the Automotive Section. [19]

Q. Now, may I ask to whom this is distributed?

A. The catalogue is the mode and method by which we notify veterans of purchases of property that we have for sale. After application is filed and a pink slip is issued—those pink slips are used to create a mailing list—to those on the mailing list, these catalogues are sent so as to enable them to participate in sales. There are others distributed to the various veterans' groups and generally speaking, we would have a surplus amount for distribution through the office in conjunction with the mailing.

Q. And this sale of the Chevrolet, then, was under the set-aside? A. That is correct.

Mr. Bonsall: I ask that this be marked in evidence as Government's Exhibit 1 in evidence.

The Court: So ordered; no objection?

Mr. Tramutolo: No objection.

The Clerk: May it be marked Government's Exhibit 11 in evidence?

(The brochure in question was thereupon received in evidence and marked United States Exhibit No. 11.)

Mr. Bonsall: The jury might like to examine it while we are proceeding.

The Court: You might direct the jurors' attention to the particular passage or page. [20]

Mr. Bonsall: Q. What page is that on?

A. I would have to find it.

(Testimony of Frank A. Chambers.)

The Court: Otherwise the book would have no materiality.

The Witness: I think it is item 289, is it not?

The Court: I assume that page shows—

Mr. Bonsall: Q. Do you have the page number?

A. No, I don't.

Mr. Bonsall: It is on the other documents introduced in evidence.

The Court: I direct the jury's attention to the passage by reading it through the witness.

Mr. Bonsall: I only want to direct attention to the fact that the White truck appears in this brochure—or the Chevrolet.

The Witness: I think this refers to the Chevrolet truck, aerial gunnery type, ton and a half, that appears at page 26. It is the first line item. There is no entry made of Csaki's name indicating that he had made a purchase of it after the original allocation had been made.

Mr. Bonsall: That is the only reason I wanted the jury to see it.

Q. Now, you have another brochure with a blue cover, is it?

A. With a green cover, I believe.

Q. All right. May I see that, please? This is entitled "Northern California-Nevada trucks over 2½ tons and truck [21] tractors for sale, federal agencies June 3-17, veterans World War II June 24 to July 12; small business certified by RFC July 22 to August 2; state and local governments July 22 to August 6; non-profit institutions July 22 to August 7 in War Assets Administration."

(Testimony of Frank A. Chambers.)

I will ask you what this brochure is.

A. This brochure is an offering or catalogue of material available to all priority holders in their sequence established by law. This type sale is normally called a cycle sale, as distinguished from a set-aside sale.

Q. Does that brochure show the three White trucks concerning which you have previously testified? A. It does.

Q. Where do they appear?

A. If I may answer this way, this sale differs from the last in that property had to be sold by the deadline date as shown in the brochure to each of the priority groups, so that to participate in this sale an order had to be placed and allocation was then made to veterans so that the allocation made in this instance shows the name of Oscar Osaki appearing on each of the three trucks that he purchased in this sale.

Q. On what page of the brochure?

A. There are two listed on the first page—

Q. On what line?

A. (Continuing) —of the brochure, the second line for tag No. [22] 614 and then on the fifth line for tag No. 617. Then on page 2, under Tag No. 540, two, four, six, eight, ten, twelve, that would be line No. 14.

Q. I notice in this book the names of some people written in above the respective articles in pencil. What does that represent?

A. That represents that these are the veterans

(Testimony of Frank A. Chambers.)

to whom allocation has been made. It is the master file retained by the Automotive Section.

Q. Are those names of veterans?

A. They are.

Q. Do you find Csaki's name written in on these three trucks?

A. I find Csaki's name written in on the three trucks.

Mr. Bonsall: I ask that this be marked as Government's exhibit in evidence No. 2.

The Court: So ordered.

Mr. Tramutolo: I take it, your Honor, it is restricted merely to the transactions involved in this case.

Mr. Bonsall: That is true.

The Clerk: Government's Exhibit No. 12 in evidence.

Mr. Bonsall: Q. Before a veteran can purchase at all, he has to make application to you, does he not? A. That is correct.

Q. And I think you testified those applications were made on form 66. [23]

A. That is correct.

Q. Have you any of those forms 66 relating to Csaki?

A. I have two in my possession. The first filed by Oscar Csaki bears date December 11, 1945. It was filed in the War Assets office apparently by mail. There is no record of any action ever having been taken on this application.

Mr. Bonsall: All right, I will ask that this be

(Testimony of Frank A. Chambers.)

marked in evidence as Government's exhibit next in order.

The Court: So ordered.

The Clerk: Marked Government's Exhibit 13 in evidence.

(Form 66 dated December 11, 1945 was thereupon received in evidence and marked United States Exhibit No. 13.)

Mr. Bonsall: Q. Do you have another one of these forms executed by Mr. Csaki?

A. I do. I have an application here showing it to be a supplemental application for Oscar Csaki. It bears the date of March the 27th, 1946, and shows that the veteran was in the business of pick-up and delivery and requested a number of trucks at that time. This application was approved on March the 27th, 1946, and form 63, the pink slips, were issued against it.

Q. Now, I notice under 18 here this provision: "I am not procuring the property listed in this application for the purpose of resale; that said property is to be used in and as part of the enterprise described herein."

Was that provision in there when that was filed with you? [24] A. That is correct.

Q. Then appears the signature of Oscar Csaki?

A. That is correct.

Q. Below that there is what purports to be a certificate. What form of certificate is that?

A. Below there is the certificate or there is the information pertaining to the veteran's military service?

(Testimony of Frank A. Chambers.)

Q. Who prepares that and how is that executed?

A. The interviewer enters that at the time the applicant presents the application, and he must present some proof of discharge or honorable discharge from the service, and this entry as to his military status is entered at that time by the interviewer.

Mr. Bonsall: Pardon me just a moment.

Q. Now, again inviting your attention to Exhibit No. 12 in evidence, you stated that the property indicated by pencil marks was all allocated to veterans under their priorities, is that correct?

A. That is correct.

Q. Now, was there much property left over after the allocation to veterans?

A. There doesn't appear to be much there. There might be. There might conceivably be one or two, one or two items that went on to the lower priority of small business.

Q. But that is all, the rest was allocated to veterans? [25]

A. The rest was taken to veterans.

Mr. Bonsall: All right. Just a moment, your Honor.

Q. You know John Stephen Hildebrand, don't you? A. I do.

Q. How long have you known him?

A. Well, since March of 1946.

Q. What was his occupation while you knew him?

(Testimony of Frank A. Chambers.)

A. He was associated with the War Assets Administration in the Automotive Section.

Q. And how long was he employed there?

A. He was employed by War Assets—I have a record here of his employment.

Q. You have an official record of his employment?

A. If I may refer to it. This is an extract of the official records and only shows that he was originally employed by us on October 30, 1945 and resigned on May 31, 1946.

Q. What was the nature of his duty while he was employed by the War Assets Administration?

A. We show him in the position of inventory clerk in the Automotive Section.

Q. What would an inventory clerk in the Automotive Section do, exactly?

A. Well, specifically their duties were numerous and somewhat flexible, but in general they were concerned with the control of the copy of the pink slips that were sent to that section. [26] They also aided and assisted veterans in making out the required forms for purchase, and also aided in the allocation of material and property at the conclusion of a sale.

Q. Do you have a form 66 there?

A. I do. I have that supplemental form.

Mr. Bonsall: I ask that this be marked in evidence as Government's exhibit next in order, your Honor.

The Court: What is the form?

(Testimony of Frank A. Chambers.)

Mr. Bonsall: Application 66, application for priorities, identifying the application of Oscar Csaki. I believe he has done that.

The Witness: That is correct.

Mr. Bonsall: To purchase certain property, dated March 27, 1946.

The Court: So ordered.

Mr. Tramutolo: What number is that?

Mr. Bonsall: He hasn't given it a number.

The Clerk: Government's Exhibit 14.

(Form 66 referred to was thereupon received in evidence and marked United States Exhibit No. 14.)

Mr. Bonsall: Government's Exhibit 14.

Q. Do you know Mr. DeBon, the defendant DeBon? A. I do not, no

Q. Do you have any record of any transactions with your office by Mr. DeBon? [27]

A. Well, the records show that he has had numerous, very many purchases from us.

Q. When did these purchases start?

A. Well, our records show that the first purchase made by Mr. DeBon was on April 4, 1946.

Q. April 4, 1946, and numerous purchases since that time? A. Since that time.

Q. Do you know the aggregate amount of those purchases? A. No, I do not, sir.

Q. All right, were those purchases made by Mr. DeBon made as a veteran? A. No.

Q. These others were lower priority purchases?

A. Made either on one of two bases, either un-

(Testimony of Frank A. Chambers.)

der the category of general public or non-priority basis or by the exercise of priority in the small business level under RFC.

Q. Now, I presume this whole Government's Exhibit 12 was distributed the same as the circular, Government's Exhibit 11.

A. Except that it had wider distribution. 11 was limited to veterans, and that went to all priority holders.

Mr. Bonsall: That's all.

Cross Examination

Mr. Tramutolo: May I see Exhibit No. 14?

Q. Mr. Chambers, I show you again Government's Exhibit No. 14 of a supplemental order, or how do you designate that particular [28] document? I would like to get your designation of it.

A. That would be an application form, form No. 66.

Q. In other words, this was prepared by the veteran Oscar Csaki for the things that he wanted back in March of 1946, to be exact, March the 27th, 1946? A. That's correct.

Q. And he enumerates on here jeep, quarter-ton trailers, pickup truck, dump truck and three van trucks. Does that three van trucks refer to the White trucks in this particular transaction?

A. This application was filed and is filed—an application is filed for what the veteran needs in his particular enterprise without ever having specific knowledge that such knowledge will ever be available.

(Testimony of Frank A. Chambers.)

Q. In other words, that is what he is on the lookout for. A. That is right.

Q. In other words, I notice here that an ambulance or panel and delivery one-half or three-quarter one-ton truck. All the materials listed on this application, Government's Exhibit 14, when the material is available, then he is qualified to get it? A. He is notified.

Q. He is notified? A. That is correct.

Q. Then he gets the various documents that you have introduced, [29] and finally gets title to the property after it is paid for.

A. That's correct.

Q. He filed an original application, as I believe you testified. The previous one was filed in December of 1945, dated December—well, this also is dated. I notice here.

A. I think you will find the date on the back.

Q. They have on the front "3-26-46".

A. That refers specifically to that, that was issued.

Q. Who scratched out all of these other descriptions such as he put in at the top of a three-quarter or half-ton truck Chevrolet type General Motors, Chevrolet, Dodge or Ford, flatbed; I notice he asked for a four-door sedan, preferred a Plymouth or Chevrolet and what not; who scratched that out?

A. The specific individual that scratched it out I can't answer.

(Testimony of Frank A. Chambers.)

Q. You don't know whether Csaki did it or the interviewer or a screener, as you call it?

A. I know it was done by the screener or interviewer, because the veteran is permitted to secure only those items tied into his business and actually necessary in his business.

The Court: What was the indication of his business?

The Witness: The indication in the first application was that he was buying waste materials, bags and metals. The second application was pickup of scrap iron from metal businesses.

Mr. Tramutolo: Q. When the applicant fills out these two [30] forms that I have just shown you, and he is interviewed by someone employed by War Assets as to his need for this particular property? A. That's correct.

Q. And they ascertain that he is a veteran of good standing, honorably discharged.

A. That is correct.

Q. And they ask where his place of business is to be and all the details essential to this application.

A. They ask sufficient questions to determine that the request is valid, yes.

Q. When the applicant is interviewed—in this particular case Mr. Csaki—is he accompanied by anyone or was he interviewed alone or is he interviewed alone?

A. I can't answer that, or do you mean as a matter of custom?

(Testimony of Frank A. Chambers.)

Q. That is right.

A. He is customarily interviewed alone, unless he likes to bring someone with him. There may be any reason why he has someone with him.

Q. Was Csaki an employee of War Assets?

A. He was not.

Q. The only man who was employed was John Steven Hildebrand, the other man mentioned in this indictment? A. That is correct.

Q. And you say you do not know Mr. DeBon?

A. No, I do not.

Q. But the records do reveal numerous transactions with the Government?

A. That's correct.

Q. Do you know how recently was the most recent transaction Mr. DeBon had with the Government?

A. I know of a transaction he had last Thursday at a spot sale.

Q. Do you know the nature of that particular transaction, the nature of the purchases made at that time by him?

Mr. Bonsall: I don't think they are in issue here.

The Court: Sustained.

Mr. Bonsall: It is objected to for that reason.

Mr. Tramutolo: That's all, your Honor.

The Court: Step down. Call your next witness.

Mr. Bonsall: Mr. Ench. I will put on two or three witnesses out of order, your Honor, like representatives of the Motor Vehicle Department.

(Testimony of Frank A. Chambers.)

The Court: Can you stipulate to the nature of the testimony?

Mr. Tramutolo: Mr. Bonsall, if you will just state to the Court what you expect to prove by them, perhaps we can expedite it.

Mr. Bonsall: I expect to prove that certain of these trucks were registered with the Motor Vehicle Department and [32] the Chevrolet was not registered, but I can prove by the Motor Vehicle Department that there was a bill of sale filed with them from Csaki to DeBon.

Mr. Tramutolo: I will stipulate that is true.

Mr. Bonsall: And that all the remaining cars were transferred of record from Mr. Csaki to Mr. DeBon, according to the records of the Motor Vehicle Department.

Mr. Tramutolo: You have a bill of sale from Mr. Csaki to Mr. DeBon?

Mr. Bonsall: For the Chevrolet, and that the other cars were regularly transferred. I have the records here and photostats of the records.

The Court: The Motor Vehicle Department agent has the photostats?

Mr. Bonsall: He has, your Honor. I would like to have them in evidence in place of the originals. Mr. Ench.

FRANK B. ENCH

was called as a witness on behalf of the United States, and having been duly sworn, testified as follows:

The Clerk: Will you state your name to the Court and jury?

The Witness: Frank B. Ench, E-n-c-h.

Direct Examination

Mr. Bonsall: Q. Mr. Ench, what is your occupation?

A. I am supervisor of the branch offices of the Department of [33] Motor Vehicles of the State of California.

Q. You were subpoenaed to produce here today certain records? A. Yes, sir.

Q. One relating to a Chevrolet, motor BV-488-492. Do you have that record with you?

A. Yes, sir.

Q. May I see it, please?

The Court: Mr. Tramutolo, would you examine these as we go along?

Mr. Bonsall: He hasn't examined these, your Honor. I didn't have them.

The Witness: The photostats are on top. The records are down below.

Mr. Bonsall: Q. Will you pick out the record of the transaction, the transfer from Mr. Csaki to Mr. DeBon?

The Court: The motor number and identity of the vehicle.

Mr. Tramutolo: If that all pertains to deals be-

(Testimony of Frank B. Ench.)

tween, or whatever you have in the way of documents from Mr. Csaki to Mr. DeBon, I will stipulate Mr. Ench is an employee of the State government who has a right to produce them in court.

The Court: Identify the motor vehicle in question, whether a White truck or Chevrolet.

Mr. Bonsall: Q. Give your record of that transaction as you have it.

A. Bill of sale purported to be signed by Oscar Csaki, C-s-a-k-i, [34] 75 Roteck Street, San Francisco, selling Chevrolet engine BV-488492, serial number 9NE22-4254 to the DeBon Motor Company.

Mr. Bonsall: Q. Do you have a photostat of that document? A. Yes, sir.

Q. Was that ever registered in the State of California? A. No, sir; no, sir.

Mr. Bonsall: All right, that is all.

I will ask that this photostatic bill of sale be introduced in lieu of the original, Mr. Tramutolo.

Mr. Tramutolo: No objection.

Mr. Bonsall: To be marked in evidence as Government's Exhibit next in order.

The Clerk: Government's Exhibit 15 in evidence.

Mr. Bonsall: Q. You were also asked to produce the records of registration of White truck motor number HXC324938. A. Yes, sir.

Q. Have you that? A. Yes, sir.

Q. The original and photostat of that registration? A. Yes, sir.

Q. What I want is the transfer, if it is shown, from Mr. Csaki to Mr. DeBon.

(Testimony of Frank B. Ench.)

The Court: If it does show. [35]

Mr. Bonsell: Q. If it does show.

A. Yes, sir, this is the document right here.

Q. Where is the photostat of it?

Here is the original, Mr. Tramutolo.

Mr. Tramutolo: Bill of sale?

Mr. Bonsall: Yes.

Mr. Tramutolo: I want the Court and jury to know, your Honor, that we make no denial of the purchase of the three trucks and I said this morning two Chevrolets, although they restrict it to one Chevrolet, so if that will save time, Mr. Bonsall—

Mr. Bonsall: I would still like to put these records in while I have them here.

The Court: There is really no issue raised by the defense on this aspect of the case. Mr. Tramutolo has stipulated that the four vehicles in question found their way and title vested in the DeBon Motors, from Csaki, the veteran.

Mr. Tramutolo: That is correct, your Honor.

The Court: What more do you want?

Mr. Bonsall: I don't want any more.

The Court: Ladies and gentlemen of the jury, in expedition of the trial of the case, very often in connection with documentary evidence and the like, stipulations are entered into between counsel, and the stipulation has the same force and effect as testimony orally adduced through the medium of a [36] witness. Therefore in the light of that stipulation you take as an admitted fact in this

case the automobiles or vehicles in question which Csaki purchased through the WSA ultimately found their way into the possession of the defendant DeBon through the DeBon Motor Company.

All right.

Mr. Bonsall: All right, call Mr. Solini next. I think there could be a stipulation here that we were bringing this witness, an officer from the Bank of America, here to show that Mr. DeBon secured certified checks to pay for these cars from that institution, and we have photostatic copies of the checks in question.

The Court: I assume there is no question on it.

Mr. Tramutolo: None at all.

The Court: Will you state the stipulation?

Mr. Tramutolo: That Mr. DeBon got the cashier's checks and paid War Assets Administration for the trucks in question from the Bank of America.

Mr. Bonsall: All right.

The Court: Is that clear, ladies and gentlemen? All right, the stipulation is made a matter of record between counsel.

Mr. Bonsall: Mr. Hildebrand.

The Court: The witness from the Bank of America is excused.

Mr. Tramutolo: That is quicker than they could declare a dividend, your Honor.

Mr. Bonsall: Mr. Hildebrand.

[Endorsed]: Filed Sept. 22, 1948. [37]

[Endorsed]: No. 11841. United States Court of Appeals for the Ninth Circuit. Ed DeBon, Appellant, vs. United States of America, Appellee. Second Supplemental Transcript of Record. Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 8, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11841

ED DeBON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STIPULATION AND ORDER THAT TESTIMONY OMITTED FROM RECORD ON APPEAL BE MADE A PART THEREOF AND THAT APPELLANT'S TIME FOR FILING HIS OPENING BRIEF ON APPEAL HEARING BE EXTENDED

Whereas the Designation of Contents of Record on appeal filed in the court below (R. 24) required a reporter's transcript of the evidence and all jury instructions offered and given to be included in the record on appeal and whereas the testimony of Frank Chambers, a witness for the prosecution and said instructions, by inadvertance, were omitted from said record, it is stipulated that the said testimony of said witness and appellant's instruction offered but not given to the jury may be printed and added to said transcript of record on appeal and that the appellant

may have to and including the 13th day of October, 1948, within which to serve and file his opening brief on appeal herein.

FRANK J. HENNESSY,
U. S. Attorney.

By /s/ EDGAR R. BONSALL,
Assistant U. S. Attorney,
Attorney for Appellee.

/s/ CHAUNCEY TRAMUTOLO.

So Ordered: Sept. 13, 1948.

/s/ WILLIAM DENMAN,
United States Circuit Judge
Presiding.

[Endorsed]: Filed September 18, 1948. Paul P. O'Brien, Clerk.

No. 11,841

IN THE

United States Court of Appeals

For the Ninth Circuit

ED DE BON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

CHAUNCEY TRAMUTOLO,
Alexander Building, San Francisco 4, California,
Attorney for Appellant.

WAYNE M. COLLINS,
Mills Tower, San Francisco 4, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 11,841

IN THE

United States Court of Appeals

For the Ninth Circuit

ED DE BON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING BASIS OF COURTS' JURISDICTIONS.

This is an appeal by Ed De Bon, a defendant below, from a judgment of conviction (R. 20), following a verdict of guilt, on counts one and three of an indictment, the first charging him, jointly with defendants Osaki and Hildebrand, with conspiring to make and file false applications with the War Assets Administration to purchase surplus war materials, in violation of Title 18, U.S.C.A., Section 88, and the third with the substantive offense of making false mail order requests to said agency and concealing therein that automobiles were being purchased for the appellant, in violation of Title 18, U.S.C.A., Section 80.

The appellant was indicted (R. 2), arraigned in the trial Court and entered a not guilty plea to the charges

preferred against him. (R. 11.) His co-defendants pleaded guilty to the charges, one being fined (R. 212) and the other placed on probation and fined. (R. 214.) He was tried by a jury. He moved for a dismissal of the proceeding at the close of the prosecution's case and at the close of the defendant's case, both motions being denied. (R. 13.) Thereafter the jury returned its verdict finding appellant guilty of violations of counts one and three of the indictment and not guilty of count two thereof. (R. 16.) Thereupon he moved in arrest of judgment and said motion was denied. (R. 14, 19.) Thereafter, the trial Court sentenced him to six months in the county jail on count one, the sentence being suspended and appellant ordered placed on probation for two years and fined him $2500 on said count and $2500 on count three, the judgment and sentence to run consecutively. (R. 216.) Thereafter the appellant moved for a new trial which was denied. (R. 19.) Thereafter he initiated this appeal from the judgment of conviction, sentence, probation order and fines. (R. 22.)

STATUTORY PROVISIONS SUSTAINING JURISDICTIONS OF COURTS.

The District Court below had jurisdiction of this case by virtue of the provisions of Title 28 U.S.C.A., Sections 80 and 88, and 41, subd. 2, and the appeal was taken to this Court under Rules 37, 38 and 39 of the Rules of Criminal Procedure for the District Courts of the United States.

This Court has jurisdiction upon appeal to review the judgment of the District Court below by virtue of the provisions of Title 28 U.S.C.A., Section 225, subd. (a) first and third and subd. (d).

The pleadings necessary to show the existence of the jurisdictions are the indictment (R. 2), plea of not guilty (R. 11), the verdict (R. 16) and the judgment, sentence and fines. (R. 20.) The facts disclosing the basis upon which the Court below had and this Court has jurisdiction to review its judgment on appeal are set forth in the statement of the case herein with particularity and record page references.

STATUTES, THE APPLICATION AND VALIDITY OF WHICH ARE INVOLVED.

One

Title 18 U.S.C.A., Section 88, which reads as follows:

> "88. Conspiring to Commit Offense Against United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Two

The applicable part of Title 18 U.S.C.A., Section 80, reading as follows:

"80. PRESENTING FALSE CLAIMS, AIDING IN OBTAINING PAYMENT THEREOF.—

" * * * whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, * * * in any manner within the jurisdiction of any department or agency of the United States * * *, shall be fined not more than $10,000 or imprisoned not more than ten years."

STATEMENT OF THE CASE.

THE APPLICATIONS.

Hildebrand, a war veteran, was engaged in the used car business with his war veteran partner, Tom P. Mee of Bakersfield (R. 82), and as such they were authorized to purchase surplus property from the WAA as licensed "veteran dealers". (R. 57, 87, 90.) He had exhausted only $2,000 of the $25,000 priority rights he was entitled to receive individually. (R. 82, 83.) This partnership continued to September, 1946. (R. 87.) Both partners were certified to the WAA as "veteran dealers". (R. 87, 90.) Hildebrand was such a dealer when he first met De Bon on July 8, 1946 (R. 90), and was introduced to him as such a dealer. (R. 142, 154.) De Bon dealt with Hildebrand as such a dealer. (R. 154, 150.) On prior occasions Hildebrand had been in the habit of obtaining surplus property on his own priorities and turning it over to his employer-partner Mr. Mee for resale purposes. (R. 80-81-87.)

Hildebrand talked to Osaki, a veteran friend who had a $25,000 priority right, a few months before March, 1946, evidently on or about December 11, 1945 (R. 31, 90, 92), for on that date Osaki had applied in writing to the WAA for the purchase of surplus property (R. 54, 92, 93; Exh. 13), and had been given his priority status but had not used his priority rights. (R. 92, 58.) Hildebrand suggested to Osaki that he should exercise the right to use the residue of his priority rights. (R. 33.) Osaki agreed to use it. (R. 32.) Pursuant thereto in March, 1946, Osaki signed a "Supplemental Veteran's Application for Surplus Property" (*Exh. 14;* R. 31, 32, 92, 93, 94, 95), dated March 27, 1946. (R. 32, 54.) Both Osaki and Hildebrand filled out this form. (R. 32, 35, 54, 56, 92, 93, 95, 96.) Paragraph 18 of that form contained a statement that the applicant was not procuring the property for resale purposes. (R. 261.) *If this document contained false statements and data* (R. 88) *it was placed thereon by Hildebrand and Osaki.* (R. 55, 56, 93, 94, 95, 96.) This form was presented by Osaki and Hildebrand to the certification section of the WAA (R. 36) for certain items, viz., 3 White van trucks, and delivered to Osaki pink slip priorities (Exh. 6, R. 36, 36) for certain items, viz., 3 white van trucks listed in the application, and Osaki delivered these to Hildebrand (R. 8, 96) who "threw them in the glove compartment" of his own car. (R. 36.) Hildebrand once had worked for the WAA. (R. 53.) The two, Hildebrand and Osaki, had discussed and expected that they would go into business sometime in

the future and then make use of the priorities. (R. 36, 37, 57.) They did not abandon getting the property described in that application until months later (R. 57), probably in April 1946. Neither Osaki nor Hildebrand was acquainted with the appellant De Bon during this period of time. Hildebrand first became acquainted with De Bon in July, 1946. (R. 40, 53, 57, 38, 39, 45.) Osaki first met De Bon on July 24, 1946. (R. 127, 128, 142.)

Hildebrand first met De Bon, a dealer in automobiles, in the WAA office at 30 Van Ness Avenue, San Francisco, on July 8, 1946. (R. 40, 138, 139.) He was introduced as a "veteran dealer" to De Bon (R. 142) and told De Bon he had a partner. (R. 154.) Hildebrand testified that at this time, "I believe it came around that he (De Bon) wanted me to get him some units that were in the sale, if I could exercise a priority" (R. 40), and that he stated, "I told him I would try". (R. 42.) De Bon had signified an interest in two Chevrolet gunnery trucks and in a number of White van trucks which were listed in WAA brochures, *Exhs. 11 and 12.* (R. 42, 49, 50, 59, 139.) De Bon was willing to pay him a profit of $50 apiece if he acquired and would sell him two Chevrolet trucks (R. 80) and $500 for three White van trucks (R. 82) if he, as a veteran dealer, got them and sold them to him. Thereupon, Hildebrand, without informing De Bon, went alone to the WAA office across the street at 1540 Market Street where he filled out and submitted two applications, that is to say, "Mail Order Requests For Surplus Property". *Exhs.* 1 and

5; (R. 42, 43.) *There are no false statements in either of these requests.* Unless it be contended that Osaki was not to receive title thereto from the WAA which, obviously, is not the case, the requests neither expressly nor impliedly were false. The first *(Exh. 1)* was prepared and filed with the WAA by Hildebrand in Osaki's name (R. *43*) and the second (Exh. 5) by Hildebrand and this later was ratified by Osaki. (R. *44.*) Neither Osaki nor Hildebrand at any time informed De Bon that either or both of them had made the prior Veteran's Application and Veteran's Supplemental Application for surplus war material, and neither at any time informed him of the making or filing of any mail order requests. Hildebrand testified that "all I told Mr. De Bon was that all that I could do was to put in for the units and just hope to get them, that was all". (R. 63.) De Bon never knew, heard, saw or authorized the making or filing of these requests. There is not an iota of evidence in the record from which the contrary could even be inferred.

The Mail Order Requests.

The first of these mail order requests, viz., *Exh. 1,* was for a Chevrolet gunnery truck, mentioned in Counts One and Two of the indictment, which was a unit left over after the WAA sale had been concluded and which none of the veterans wanted. (R. 41, 42.) It was available as a left over after-sale unit (R. 42) and, therefore, apparently open to purchase by non-veterans. This request was signed in the name of "Oscar Osaki" by Hildebrand who placed his own

initials, "JDH", immediately following the signature. (R. 43.) At the time Hildebrand had not consulted Osaki about the use of his name but he did so that night and obtained Osaki's oral consent thereto. (R. 43, 44.) The next day, July 9, 1946, Osaki went to the WAA office and there signed Disposal Document 10, dated July 8, 1946, *Exh. 2,* as a buyer. Copies thereof (Exh. 3) were signed in his name by WAA officers. *Exh. 3* carries the notation that on July 9, 1946, $1125.96 was paid for the Chevrolet gunnery truck. Oral evidence shows that Osaki paid this sum for the truck through the medium of a cashier's check endorsed by De Bon payable to the Treasurer of the United States which De Bon had delivered to Hildebrand who delivered it to him. He paid this to the WAA, as per invoice. (R. 48, 64.) The WAA issued a bill of sale to Osaki dated July 8, 1946, covering the purchase. See *Exh. 4.* On July 9, 1946, Hildebrand told Osaki he had sold the truck to De Bon (R. 100), and, at Hildebrand's request, Osaki thereupon executed a bill of sale to De Bon (R. 150) which was delivered to De Bon by Hildebrand and De Bon got possession. Thereafter De Bon paid Hildebrand a profit of $50 for this sale to him. (R. 48.) De Bon never knew that Osaki's personal priorities had been used to procure this Chevrolet truck. (R. 150.) He thought he was dealing with an authorized veteran dealer (Hildebrand) whom he had been informed had a partner. (R. 150, 82, 57, 87, 90.) De Bon used the truck in his business. (R. 141.) Several days after the sale Hildebrand voluntarily gave Osaki either $15

or $25. (R. 100, 122, 126.) De Bon never had any knowledge of this division of profits until sometime after the sale of this item and of the three White trucks had been consummated. (R. 67.) De Bon later sold this Chevrolet truck to Laurence J. Risling. See *Exh.* 15.

The second of these mail order requests, viz., *Exh. 5,* was for White van trucks, mentioned in Counts One and Three of the indictment. Whether or not these trucks were "after sale units" or not and whether available to purchase by non-veterans or were restricted to veterans does not appear from the evidence. This request then and there was signed, on July 8, 1946, in the name of "Oscar Osaki" by Hildebrand who did not then have Osaki's permission to sign his name thereto but who obtained his permission that night (R. 51, 74), or, according to Osaki, several days later. (R. 100.) In any event Osaki gave Hildebrand his oral consent to apply for *one* White truck and later was astounded to learn from a notice he received from the WAA that he had been awarded three (3) White trucks (R. 101), but he, nevertheless, went to the WAA office, signed three Disposal Documents No. 10, *Exh. 8,* on July 17, 1946. *Exhibit 9* containing copies of said disposal documents are WAA copies of Exh. 8. Exh. 7 is a WAA memo concerning Osaki's desire to purchase three trucks. At the request of Hildebrand, he met Hildebrand and also De Bon at the WAA office at 30 Van Ness Ave., San Francisco, on July 24, 1946. This was the first time Osaki met De Bon. (R. 101.) Hildebrand delivered to Osaki three

Bank of America cashier's checks each in the sum of $3629 drawn payable on July 24, 1946, to De Bon's order and bearing endorsements by him payable to the order of the Treasury of the United States which De Bon had delivered to him. (Exhs. 16, 17, and 18; R. 101, 103, 104, 143.) Osaki bought the trucks. (R. 115.) Osaki paid the WAA for these trucks and received from the WAA three Bills of Sale from the WAA to Osaki for the three (3) White van trucks. See *Exh. 10.* Thereafter Osaki executed a notarized bill of sale to De Bon (R. 101, 102, 143) covering the transfer. De Bon had no knowledge that Osaki's personal priorities had been used to obtain these trucks. (R. 150.) He had been informed (R. 142) and believed he was dealing with an authorized veteran dealer. (R. 150, 82, 57, 87, 90.)

Thereafter De Bon paid Hildebrand a profit of $580 on the sale of the three White trucks. (R. 140, Exh. 19.) Later Hildebrand gave Osaki $120. (R. 108, 109, 122, 126.) De Bon had no knowledge that Hildebrand was dividing his profits with Osaki. (R. 67.)

The appellant was indicted, tried by jury and found guilty, sentenced, fined and placed on probation, as hereinabove stated, and appealed from said judgment.

QUESTION INVOLVED.

1. Where two war veterans partners, one of whom held his firm out to the appellant to be a "veteran dealer", had made and filed a false Supplemental Vet-

eran's Application with the WAA to procure automobiles from its stock of surplus war material and the veteran dealer long thereafter, with the acquiescence of his partner, agreed to sell a Chevrolet gunnery truck and three White van trucks to the appellant and thereafter, through the medium of a mail order request, which contained no false statements but was filed by the veteran dealer with the WAA in the name of his partner, procured several cars and sold four of them to the appellant, a stranger, is the appellant guilty of a conspiracy to make and cause that false application to be made, in violation of 18 USCA 88, or of the substantive offense of making and causing a false Mail Order Request for the three White van trucks to be made or concealing therein that the veteran was purchasing for resale purposes, in violation of 8 USCA 80, when the purchaser neither participated in nor had notice or knowledge of the making, filing or false contents of that Application or of the Mail Order Request?

2. Isn't a judgment of conviction, punishment and fine meted out under both statutes void for duplicity and for double jeopardy where the two counts charge the persons, times and places constituting the gravamen of the offense are the same?

SPECIFICATION OF ASSIGNED ERRORS TO BE RELIED UPON.

1. The trial Court erred in denying appellant's motion for his acquittal made at the conclusion of the prosecution's evidence. (R. 13.)

2. The trial Court erred in denying appellant's motion for his acquittal made at the conclusion of the testimony. (R. 13.)

3. The trial Court erred in denying appellant's motion for a directed verdict. (R. 13.)

4. The trial Court erred in denying appellant's motion in arrest of judgment upon the ground the indictment did not state facts sufficient to constitute an offense against the U. S. (R. 15, 17, 19.)

5. The trial Court erred in denying appellant's motion for a new trial upon each and all of the grounds therein mentioned. (R. 18, 19.)

6. The jury erred in returning a verdict of guilty on Counts One and Three of the indictment. (R. 16.)

7. The trial Court erred in entering a judgment of guilty against the appellant on Counts One and Three. (R. 20.)

8. The trial Court erred in sentencing the appellant to six months in the County Jail on Count One which sentence was suspended and appellant ordered on probation for two years and fining him $2500 thereon and in fining him $2500 on Count Three, the judgment and sentence to run concurrently, the judgment of conviction, sentence and fine on Count One and the judgment of conviction and fine on Count Three being void for placing him in double jeopardy, for inflicting double punishment upon him and for being excessive and duplicitous, in violation of the 8th and 5th Amendments. (R. 20, 22.)

9. The trial Court erred in failing to declare a mistrial and in permitting the case to go to the jury and in failing to grant a new trial because of the misconduct of counsel for the prosecution suggesting in his summation to the jury that the appellant was guilty of conspiracies other than that charged in the indictment which misconduct was prejudicial to and materially affected his substantial rights and deprived him of a fair trial in violation of the provisions of the 6th Amendment and the guaranty of due process contained in the 5th Amendment. (R. 226.)

10. The trial Court erred in refusing to give appellant's instruction that the testimony of codefendants who had pleaded guilty was to be viewed with caution. (R. 212.)

11. The trial Court erred in refusing to give appellant's instruction that it was not a violation of the Surplus Property Act for the appellant to purchase property from a veteran having title thereto. (R. 196.)

12. The trial Court erred in refusing to instruct the jury, in response to its inquiry, that a veteran dealer could buy surplus property on his priority and sell to a nonveteran at a profit. (R. 202.)

13. The trial Court erred in refusing to instruct the jury, in response to its inquiry, that a veteran dealer could sell purchased surplus property to a third person for a profit or for a commission. (R. 205.)

14. The trial Court erred in instructing the jury that one who aids and abets an offense is criminally liable as a principal. (R. 185-6.)

15. The trial Court erred in refusing to instruct the jury, in response to its inquiry, that an innocent purchaser from a veteran dealer or from a veteran who held himself out to be such a dealer could pay such a dealer a profit on a purchase from him without being culpable or guilty on the charges contained in the indictment. (R. 205.)

16. The verdict of guilty on Counts One and Three and the entry of judgment and sentence thereon are void for each of the counts in the indictment fails to state facts sufficient to constitute an offense, to-wit, Count One fails to state in what particular respects, if any, the Applications therein charged were false and, Count Three fails to state in what particular respects, if any, the mail order request therein mentioned was false.

17. The judgment is contrary to law.

18. The judgment is contrary to the facts.

19. The evidence is insufficient to sustain the judgment of conviction, sentence and fines.

ARGUMENT.

WHAT THE COUNTS CHARGE.

Count One.

Count 1 charges that the appellant, jointly with the two war veterans, in violation of 18 USCA, sec. 88, conspired "to defraud the United States", the object of the conspiracy being "to make and cause to be made, present and cause to be presented,—false and

fraudulent applications" by veterans for "the purchase of surplus war materials from the War Assets Corporation" in violation of a specific agreement with said agency that the purchase thereof was not for resale purposes. (R. 3-4.)

Count Three.

The gist of the charge in Count Three is that the appellant, in violation of 18 USCA, sec. 80, jointly with the two war veterans, on or about July 8, 1946, at San Francisco,

> "did knowingly and wilfully make *and* cause to be made false, fraudulent and misleading statements and representations, and did conceal and cover up by scheme and device a material fact in a matter within the jurisdiction of * * * the War Assets Administration, in that the said defendants did cause to be executed a mail order request for the purchase" of three 'White van trucks', purporting to be for defendant Osaki but, in reality, 'for the use and benefit of the defendant, Ed De Bon'."

I.

THERE IS NO EVIDENCE THAT THE DEFENDANT DEFRAUDED OR CONSPIRED TO DEFRAUD THE GOVERNMENT.

Title 18 USCA, sec. 80, defines a substantive offense and sec. 88 defines a conspiracy to violate that substantive statute.

It is significant that the indictment fails to allege specifically what statement or statements, if any, in the "Veteran's Application for Surplus Property",

the "Supplemental Veteran's Application for Surplus Property" or the "Mail Order Request" were false, or what material facts, if any, therein were concealed. In consequence, the indictment fails to state any offense against the United States. See *Hammer v. U. S.* (CCA 5), 134 Fed. (2d) 592, 595.

There is no evidence in the record which would cure these material omissions in the indictment if they were curable by proof on those issues. There is no evidence that the Government was defrauded of any property. Osaki was entitled to purchase the property and to pass title to a third person. A valid sale by the Government to the veteran Osaki for a lawful consideration passed title to Osaki and involved no element of fraud. The Government received what it was entitled to receive, viz., the purchase price. In consequence, the Government could not assert it had been defrauded.

Count Three alleges conjunctively that the defendants did "make and cause to be made" a false statement *and* did conceal "a material fact" within the jurisdiction of the WAA in executing a mail order request for the purchase of 3 White van trucks, purportedly for the veteran Osaki but with intent to purchase the trucks for De Bon. The count is void for duplicity.

The allegations in Count Three are insufficient on their face to state an offense. Osaki was entitled to purchase the three trucks and did so. Title thereto passed to Osaki and he passed title to De Bon. The

defendant De Bon neither made an application for these trucks nor executed any mail order request for them. The count contains an allegation that the defendants made a false statement but fails to state the nature of that statement and therefore fails to state an offense. It also contains no allegation of the nature of the "material fact" which was concealed and therefore fails to state an offense. The materiality of either a fraudulent statement or of a concealment must be affirmatively alleged with particularity and, in addition thereto, must be proved to sustain a conviction. It is significant that nowhere in Count Three is the nature of the false statement set forth or its materiality alleged. The count therefore fails to state an offense.

There is no proof in the record that De Bon had anything to do with the making of the mail order request or knew that it had been made. The evidence indicates the contrary. There is no evidence in the record that the mail order request was false in any material respect or that there was any concealment of a material fact therein. There was no duty upon Osaki to state therein that at the time he applied to purchase that he intended to resell the trucks at that time or at any future time. The question whether he then or later intended to resell the trucks is entirely immaterial insofar as Title 18 USCA, sec. 80, is concerned.

Title 18 USCA, sec. 80, is a "fraud" statute. Fraud includes the element of "materiality". *Twachtman v. Connelly* (CCA-6), 106 Fed. (2d) 501, 506. In conse-

quence, it is apparent that the nature of the fraud perpetrated or the concealment made must be affirmatively alleged in order for the count to state a federal offense.

Further, before the 1934 amendment, Title 18 USCA, sec. 80, required the Government to allege and also prove that it had sustained a definite loss of money or other property in order to demonstrate the commission of a crime. The 1934 amendment removed that restriction. See *U. S. v. Mellon* (CCA-2), 96 Fed. (2d) 462, 463. However, no authority has held that the amendment changed the nature of the statute from one for fraud to one for perjury requiring no oath. The essence of perjury is the *oath* whereas the essence of fraud or of concealment is *loss*. See *Rick v. U. S.* (CCA-D.C.), 161 Fed. (2d) 897, 898, stating:

> "Under well established principles of law, 'fraudulent' includes an intent and involves a subject matter of which someone is to be deprived."

It is evident, therefore, that if the Government no longer must prove actual pecuniary or property loss it nevertheless must allege and also prove a special detriment suffered by it or some other entity. Inasmuch as no pecuniary or property loss or detriment is alleged or proved by the Government to have been occasioned Count Three falls and, inasmuch as Count One merely alleges a conspiracy to violate the substantive statute (Title 18 USCA, sec. 80) it also falls for like reasons.

If Title 18 USCA, sec. 80, did not require allegations and proof of detriment suffered then, of course, every verbal and written statement made which could be encompassed by that statute which was not literally and precisely true and accurate would constitute a crime. Every argument made by attorneys in court and every pleading and brief filed which contained inaccuracies, theories and interpretations incapable of final judicial acceptance would render the attorneys liable to an indictment under that statute and their only hope against a conviction would be their ability to persuade a jury or judge that they were wanting in criminal intent. For like reasons judges themselves would be placed in a somewhat precarious position under the statute and might hesitate to express their views on the law and facts and would avoid written opinions. It were strange were counsel and courts compelled to be mute for fear of indictment. If the statute is to be so all-embracive as not to require a detriment to have been suffered as a condition precedent to conviction we suppose that all civil and criminal proceedings must come to a halt simply upon the ground that the duties of lawyers and judges have become too risky.

II.

THERE IS NO EVIDENCE THAT DE BON CONSPIRED TO MAKE FALSE APPLICATIONS OR THAT HE MADE FALSE MAIL ORDER REQUESTS.

(Conspiracy Count One.)

De Bon never had any knowledge that Osaki had filed a Veteran's Application for Surplus Property (Exh. 13) on December 11, 1945, or that Osaki and Hildebrand had filed a false Supplemental Veteran's Application for Surplus Property (Exh. 14) on March 27, 1946. (R. 88, 55, 56, 92, 96.) Neither Osaki nor Hildebrand were acquainted with De Bon at those times. Hildebrand first met De Bon four months later on July 8, 1946 (R. 40, 53, 57, 138, 139, 145), and Osaki first met De Bon on July 24, 1946. (R. 127, 128, 142.) There is not an iota of evidence in the record that De Bon at any time whatever was informed or knew or had any reason to know or any chance to know that any such applications had been filed with the WAA. The crime of making the false application, if it was false, was committed alone by Osaki on December 11, 1945. (See Exh. 13 and R. 92, 93.) The conspiracy of making the admittedly false Supplemental Application was committed by Hildebrand and Osaki on March 27, 1946. (See Exh. 14, and R. 31, 32, 54, 92-95.) A conspiracy to make either of said applications necessarily was completed on the dates when those documents were prepared and filed with the WAA. On neither of those dates was De Bon acquainted with either of them. He first met Hildebrand four months later, on July 8, 1946, and first met

Osaki on July 24, 1946. It was impossible, therefore, for De Bon to have had anything to do with either of those documents and it was impossible for him to have joined in any conspiracy in their making and filing. In consequence, the conviction against him on Count One cannot stand. The appellant's motion for acquittal made at the close of the prosecution's evidence, the like motion made at the close of the evidence and his motion for a directed verdict should have been granted for insufficiency of the evidence. So likewise should his motion for a new trial. See *Muyres v. U. S.* (CCA-9), 89 Fed. (2d) 784.

If it was the theory of the prosecution, as evidenced by the contents of Count One, that Osaki, Hildebrand and De Bon jointly conspired in March, 1946, to file false Applications for Surplus Property with the WAA and that such a conspiracy continued for approximately five months thereafter until Osaki thereafter obtained the Chevrolet gunnery truck and three White van trucks and sold them to De Bon, who thereupon became a party to an unlawful agreement, the evidence completely disproves any such conspiracy. The gravamen of the conspiracy charge is making of false applications which was completed on March 27, 1946. (See Exh. 14.) For such a theory to be applied the evidence would have to show De Bon had knowledge of the falsity and agreed to enter into a conspiracy. There is no evidence of any such knowledge and none of any such agreement which is essential to sustain a charge of conspiracy against De Bon.

If there was any conspiracy to file false applications only Osaki and Hildebrand were involved for neither was acquainted with De Bon at the times they were made and filed. If the prosecution's theory was that the conspiracy was formed by them and continued for some four months thereafter and then was re-opened so as to include De Bon as a joint conspirator and continued thereafter until Osaki passed good title to the items to De Bon or became an independent conspiracy no such charge was contained in the indictment and the evidence does not bear out any such contention.

The only acts which De Bon performed were those of agreeing to buy cars from Hildebrand who held himself out to be a member of a partnership in the used car business with a Mr. Mee of Bakersfield (who turned out to be Osaki) and led him to believe that as such a veteran dealer in used cars, he was authorized to purchase surplus war assets for resale purposes. Hildebrand had not exhausted his own priority rights as a veteran dealer but had used only $2,000 of the $25,000 rights he was entitled to. (R. 82, 83.) If these be deemed overt acts the conspiracy statute, nevertheless, was not violated by De Bon for there is no evidence in the record that he joined in any unlawful agreement. The statute is not violated by one who does not join in a conspiracy agreement. See *Marino v. U. S.* (CCA-9), 91 Fed. (2d) 691, 695; *Muyres v. U. S.* (CCA-9), 89 Fed. (2d) 784. The wrongful acts of Osaki, if they were wrong, in making the application of December 11, 1945, (Exh. 13) and the joint

making by Hildebrand and Osaki of the false Supplemental Application of March 27, 1946 (Exh. 14), long before De Bon met either Osaki or Hildebrand, is not admissible against and could not link De Bon with any wrongdoing for he had no knowledge thereof and no connection therewith and did not know either of those persons. See *Wilson v. U. S.* (CCA-6), 109 Fed. (2d) 895, 896.

If the indictment is construed to charge one single continuing conspiracy to file false applications not a shred of evidence connects De Bon with any such matter. If the prosecution had proved other conspiracies on the part of any of the defendants, such as conspiring to file false mail order requests, such evidence would not sustain the single conspiracy charged for such would be a variance between charge and proof. See *Blumenthal v. U. S.*, 92 L. Ed. Adv. 183, 188; *Berger v. U. S.*, 295 U. S. 78, 81-82, and *Marcante v. U. S.* (CCA-10), 49 Fed. (2d) 156, 157-158.

Further, the rule is that evidence to convict in a conspiracy case must be so clear and convincing as to leave no reasonable doubt as to guilt. *U. S. v. Silva* (CCA-2), 131 Fed. (2d) 247, 249. The conclusions to be drawn from circumstantial evidence of a conspiracy must exclude every other reasonable hypothesis than that of guilt. *Copeland v. U. S.* (CCA-5), 90 Fed. (2d) 78, 79. There is no evidence whatever linking De Bon with the making of the applications and mail order requests. Under the test of these rules De Bon was not guilty of Counts One or Three.

(Substantive Count Three.)

If the mail order requests (Exhs. 1 and 5 both dated July 8, 1946), made by Osaki and Hildebrand, were false in any respect it could be only in the fact that Hildebrand, in signing Osaki's name thereto and later receiving Osaki's oral approval thereof, did not disclose therein that Osaki (and Hildebrand, his patrner) intended to resell the items which might be awarded to Osaki thereunder. However, nothing in these mail order request forms supplied by the WAA required any such disclosure therein. (See Exhs. 1 and 3.) Such a requirement appears, in negative form, in the Veteran's Application for Surplus Property form which contains a statement the veteran is applying for property for specific uses. (See Exhs. 13 and 14.) However, De Bon did not meet Osaki until introduced to Osaki by Hildebrand on July 24, 1946, when Osaki executed bills of sale to him. (R. 101, 102.) Up to that moment and thereafter De Bon thought he was dealing with Hildebrand who led him to believe he (Hildebrand) was an authorized veteran dealer in used cars with a partner in that business named Mee. Neither Hildebrand nor Osaki ever informed De Bon that any such mail order requests had been made and there is no evidence in the record that he had any such knowledge that any such requests were required by the WAA to be made or of the contents of such requests.

III.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE JUDGMENT OF CONNECTION.

(Conspiracy Count One.)

In order to connect De Bon with a conspiracy it is essential for the prosecution to prove that he had knowledge of the conspiracy and intent to commit a wrongful act.

Lee v. U. S. (CCA-9), 106 Fed. (2d) 906, 907;
U. S. v. Gerke (CCA-3), 125 Fed. (2d) 243, 246;
Egan v. U. S. (CCA-8), 137 Fed. (2d) 369, 378;
U. S. v. Mellon (CCA-2), 96 Fed. (2d) 462, 464.

Inasmuch as the record reveals that De Bon had no knowledge of the making or of the contents of either of the applications conspiracy Count One falls as to him for a want of knowledge and intent. The burden of proof rested on the prosecution to prove criminal intent or to show facts from which such intent could be presumed. See *Piquett v. U. S.* (CCA-7), 81 Fed. (2d) 75, 81, cert. den. 56 S. Ct. 749; *Minner v. U. S.* (CCA-10), 57 Fed. (2d) 506, 512; *U. S. v. Schultze* (De-Ky.), 28 F.S. 234, 235, and rule, in 22 C.J.S. 883, sec. 568. The prosecution failed to sustain that burden on the conspiracy and substantive charges of Counts One and Three.

(Substantive Count Three.)

The rule as to the substantive charge in Count Three is that the prosecution must prove that the mail order request for the three White trucks were made by De Bon, that the request was false in a material respect

and that he had knowledge of the falsity. See *U. S. v. Jennison* (CCA-Kans.), Fed. Cas. No. 15,475, 1 McCrary 226, *U. S. v. Miskell* (CC-Ky.), 15 Fed. 369, 370. The evidence is conclusive that Hildebrand personally, without the knowledge of Osaki or De Bon, prepared both mail order requests (Exhs. 1 and 5), and later had Osaki orally approve his making of these requests. (R. 43-44, covering Exh. 1, and R. 51, 74, 100 covering Exh. 5.) De Bon did not participate therein.

IV.

PROOF OF ELEMENTS ESSENTIAL TO CRIME IS LACKING.

The prosecution failed to establish that there was any prohibition against the cars being purchased for resale purposes to any person, whether a veteran or non-veteran. There is no evidence that the sale by the WAA was restricted to veterans or that there was any prohibition against resale to a non-veteran. In consequence, Osaki was not duty bound to disclose that he was buying for the purpose of reselling to De Bon and the request, therefore, was true and not false since he was buying for himself for resale purposes. No such requirement appears on the Mail Order Request.

Under the Surplus Property Act of 1944, 50 USC Appendix, sec. 1625(b) the Administrator was authorized to set aside surplus property "for exclusive disposal to veterans for their own personal use, and to enable them to establish and maintain their own small business, professional, or agricultural enterprises. Un-

der the regulations set up by the Administrator, as under the statute, property could be sold to veterans for resale purposes. A characteristic example of notices annexed to applications to purchase for personal use or for resale purposes, although not offered in evidence at the trial below, reads as follows:

> *"Applications Dealing for Property Not For Resale*
>
> If the items requested are for use in your own small business, submit a signed statement to that effect and return with your application.
>
> *Applications Dealing for Property To Be Resold*
>
> To establish your status as a veteran dealer, you must furnish in addition to the attached application as an incorporation thereof the following listed supplemental evidence:
>
> (a) A letter on the stationery and over the signature of a representative of your Bank.
>
> The above letter must include a statement to the effect that the writer has evidence that you are, or will be engaged in business requiring the property sought, and that you are financially responsible for the property requested.
>
> (b) A certified or photostatic copy of lease or rental agreement, or other evidence of your control of warehouse or storage space sufficient to house the property desired.
>
> (c) A certified or photostatic copy of licenses required by law to operate your business.
>
> For your information, in accordance with the Surplus Property Act, veterans purchasing items for

> resale in their business may use their veterans priority to purchase only *one initial stock.* Further stocks for 'resale' will be sold to veteran dealers on the same basis as to non-veteran dealers in the commodity involved. This limits you to *one application.* Each item requested must show the dollar value you are willing to expend to purchase this item."

There is no doubt that De Bon thought he was dealing with a duly licensed veteran dealer in used cars. Further, there is no evidence in the case that the sales of the Chevrolet or the White van trucks were restricted to veterans under a prohibition against resale or that the Chevrolet was a left-over unit and there is no evidence that the White van trucks were not also left-over units or that there was a prohibition against their resale to veterans, veteran-dealers or non-veteran dealers.

Obviously a Chevrolet gunnery truck was of no value to anyone since it could not be used for war purposes or for anything but junk. The Government and police authorities would view the use of such a truck by a citizen as dangerous.

Although the WAA regularly noticed sales intended for veterans only whether for retention in the veteran's own business or for resale by a veteran dealer in the used car business, there is no evidence that there were any restrictions whatever placed by it on the resale of the Chevrolet or the White van trucks. The Chevrolet gunnery truck was a *left-over* unit after the veteran's sale had been concluded (R. 41-42) and, in

consequence, apparently was open for sale to any veteran or non-veteran without any agreement not to resell. Inasmuch as no evidence was introduced that the WAA placed restrictions on the sale to veterans and on a resale by them or to non-veterans on left-over units, Osaki's affidavit was not proved false in any material respect and he and Hildebrand, his partner, were not proved in this trial to have been guilty of making false mail order requests. De Bon had nothing to do with these mail order requests and had no knowledge whatever that they had been made or that they were required by the WAA to be made.

No evidence whatever was introduced showing that the sale of White van trucks was restricted to veterans or that they were not also left-over units available for sale to the public. If they fell into either classification Osaki's mail order request was not false for he was not bound to disclose therein that he was purchasing for resale purposes. His request, in consequence, was not false merely because he signed the mail order request in his own name.

V.

PROSECUTION FAILED TO SUSTAIN ITS BURDEN OF PROOF.

The prosecution failed to prove that there was any prohibition placed by law upon Hildebrand and/or Osaki from reselling the cars to De Bon and, in consequence, the mail order requests were not false for Osaki acquired good and lawful title to the cars as the purchaser.

By the mail order requests Osaki applied for the purchase of the cars. Title thereto passed from the WAA (U. S.) to him. If he thereby violated any agreement impliedly made not to resell the cars, as charged in the indictment (R. 4), the WAA could have held him civilly liable therefore, but such an agreement would not bind De Bon or defeat the title De Bon received from Osaki upon payment of a valuable consideration and for which he received proper bills of sale. De Bon dealt with Hildebrand who held himself out to be in partnership in used cars as a veteran dealer in used cars and as being eligible and qualified to purchase surplus property.

We direct attention to the fact that the WAA appears to have recognized that the prohibition against resale was absurd in its very nature and that it sought to remedy the matter by an appendix provision specifically authorizing veterans to resell property. See *Lee v. U. S.* (CCA-6), 167 Fed. (2d) 137 at 140.

Further, we direct attention to the fact that a veteran could establish his status as a veteran dealer for resale purposes. There is no evidence in the record that Hildebrand as a veteran dealer lacked authority to resell and that De Bon had knowledge of his lack of authority. The burden rested on the prosecution to establish Hildebrand's lack of authority and De Bon's knowledge of this lack. This was a burden of proof placed upon the prosecution that it completely overlooked. A case is not made out by the prosecution unless it first proves that the acts alleged to be crim-

inal were criminal. Proof of Osaki's or Hildebrand's *lack of authority to resell* is an essential element of proof before a crime could be made out.

The burden of proof rested on the prosecution to establish evidence of guilt of each element of the offense charged. See, *Bollenbach v. U. S.*, 326 U.S. 607, 613; *U. S. v. Gooding,* 25 U.S. 460, 471, 478; *Benway v. Michigan* (COA-6), 26 Fed. (2d) 168, 171, cert den. 278 U.S. 615. The prosecution herein failed to establish its burden of proof. The evidence was uncontradicted and conclusive that De Bon dealt with Hildebrand in the belief that Hildebrand was such a veteran dealer in partnership with Mee of Bakersfield although he did not know the partner to be Osaki until the time Osaki sold the cars to him.

VI.

PROSECUTION'S SUMMATION TO JURY SUGGESTING APPELLANT WAS GUILTY OF OTHER CONSPIRACIES DEPRIVED HIM OF A FAIR TRIAL.

The inadvertent reference made by counsel for the prosecution against the appellant to the jury appears in R. 226 in the following language:

> "Now, there were the two, one purchased on Hildebrand's priority and the other purchased, as we charge on Osaki's priority; and we have in this case confined ourselves to the operations between Osaki, Hildebrand, and De Bon. There may have been other conspiracies here * * *"

Although counsel for the appellant made a timely objection to that statement and the Court thereupon instructed the jury to disregard it the injury had been done and it was incurable. It is difficult enough for an accused to defend himself against serious accusations brought against him in an indictment—but it is practically impossible for him to defend himself against unfounded but equally damaging charges outside the indictment and the effect the suggestion of the commission of other offenses has on the charge being tried. The test would not seem to be whether the statement was intended to hurt but that it did its harm. Similarly, in libel and slander cases, the rule has been phrased that it is not the aim but the target that is hit that counts. The motion for a new trial should have been granted.

See,

U. S. v. McNamara (CCA-2), 91 Fed. (2d) 986, 992;

McKibben v. Philadelphia R. Ry. Co., 251 Fed. 577, 578-9.

See also:

Berger v. U. S., 295 U.S. 78, 86-89;

Crumpton v. U. S., 138 U.S. 361, 364;

Williams v. U. S., 168 U.S. 382, 398;

Paquin v. U. S., 251 Fed. 579, 580;

Sischo v. U. S., 296 Fed. 696.

VII.

CONVICTION, SENTENCES AND FINES ARE VOID FOR INFLICTING DOUBLE PUNISHMENT FORBIDDEN BY THE FIFTH AMENDMENT.

Count One charging defendants with a conspiracy to defraud the U. S. in making and causing fraudulent *applications* (Exh. 13 and 14) to be made for the purchase of White van trucks in the name of veteran Osaki for the benefit of non-veteran De Bon includes every element of the substantive offense charged in Count Three. In consequence, the imposition of the separate sentence and fine on Count One, followed by probation, and the separate fine imposed on Count Three constituted double punishment and jeopardy forbidden by the Fifth Amendment. See *Sealfon v. U. S.,* 68 S. Ct. R. 237, holding the doctrine of *res judicta* applicable where a conspiracy charge which resulted in an acquittal was held a bar to conviction on the substantive charge. See also *U. S. v. Adams,* 281 U.S. 202, 205, so holding where substantive charges were involved. See also, *Freemen v. U. S.* (CCA-6), 146 Fed. (2d) 978, 979, 980; *U. S. v. Rachmil* (DCNY), 270 Fed. 869; and *U. S. v. Clavin* (DCNY), 272 Fed. 975, 987. The doctrine of *res judicta,* or plea in bar, and also estoppel may be urged in criminal cases as well as the plea of double jeopardy. See *U. S. v. Oppenheimer,* 242 U.S. 85, 87; and *U. S. v. Holbrook* (DC Mo.), 36 F.S. 345, 348, and the plea of *autrefois acquit; In re Snow,* 120 U.S. 274, and *Ex parte Rose* (DC Mo.); 33 F.S. 941, 943, holding the imposition of consecutive sentences to be void.

The acquittal on the substantive charge of making a false mail order request contained in Count Two was *res judicata* on the same issues contained in conspiracy Count One, that is to say, on the mail order request for the Chevrolet truck.

See:

Sealfon v. U. S., 91 L. Ed. Adv. 215;
U. S. v. Adams, 281 U. S. 202, 205.

This leaves relevant to the case only the Count One conspiracy charge relating to the making of alleged false mail order requests for three White van trucks and the same issue involved in substantive charge in Count Three. We are not familiar with any precedent holding that the conspiracy charge is severable in nature. It would seem to be analagous to an egg which, if bad in a material respect, is wholly bad.

VIII.

ASSIGNED ERRORS IN INSTRUCTIONS TO JURY.

(1) The trial Court erred in refusing to instruct the jury that the testimony of codefendants who pleaded guilty should be viewed with caution.

The trial Court erred in refusing to instruct the jury that the testimony of codefendants Osaki and Hildebrand who had pleaded guilty to conspiracy Count One, the other counts thereupon being dismissed (R. 212), should be viewed with caution. The oral request for such instruction and the defendant

De Bon's objection to the Court's refusal to give it appears at R. 196, as follows:

Mr. Tramutolo. Your Honor, the one on which I wanted to address myself to the Court, and it may have been covered while I was writing, is the weight the jury must give to those who have pleaded guilty. I got just one portion of it, and I don't know whether the jury was instructed that their testimony should be viewed with caution because of the fact that they had pleaded guilty.

The Court. I have given that instruction with respect to the accomplices, and I feel it is covered. (This refers to such instruction at R. 185.)

There is a wide difference between the weight to be given to the testimony of persons asserted to be accomplices and convicted codefendants. The latter could be but by no means need be accomplices. There is no evidence in the record showing that Osaki and Hildebrand were accomplices of De Bon in any conspiracy. Their pleas of guilt to a conspiracy could not implicate De Bon but, from the instruction given on accomplices, under the circumstances, the jury might well have inferred or have been led to the conclusion that De Bon was a joint conspirator. In consequence, De Bon was entitled to the instruction he orally requested. The fact that appellant's request was oral instead of being requested in writing did not constitute a waiver of the instruction.

Bird v. U. S., 180 U.S. 350, 361-362.

(2) The trial Court erred in refusing to instruct the jury that the purchase of property from a veteran did not violate the Surplus Property Act.

The trial Court erred in refusing to instruct the jury that it was not a violation of the Surplus Property Act, for De Bon to purchase property from a veteran who received lawful title thereto from the WAA and that the Act provided no penalty for so doing. The oral request for such instruction and defendant De Bon's objection to the Court's refusal to give such an instruction appears at R. 196, as follows:

Mr. Tramutolo. The only other one, your Honor, I thought I had prepared for your Honor, was that it was not a violation of this Act to purchase property from a veteran when he acquires it himself, lawfully. In other words, there is no penalty on the Act.

The Court. Well, there is no such charge. There is no issue. You have argued that point to the jury, and I think very adequately, and you proposed no instruction on that situation and caution.

Mr. Tramutolo. I thought I proposed the one. That was the one I wanted to ask about.

The Court. No, there was none proposed. I noticed you argued it very fluently and adequately.

Argument of counsel before a jury on a question of law which is material to the case is no substitute for an instruction on the issue by the Court. Hildebrand had led De Bon to believe he was an authorized veteran dealer. Under the circumstances there was nothing wrong in his reliance upon that representa-

tion and his belief therein would relieve him from conviction for crime by reason of his lack of knowledge of Hildebrand's true status and his own lack of intent.

Further, if Hildebrand was a veteran dealer, he and his partner were authorized to resell items and, in consequence, none of them committed a wrong. De Bon was entitled to the requested instruction for said reasons.

A defendant is entitled to instructions on his theory of a case. The total failure of a trial Court to give an instruction on an issue raised by the evidence and the defendant's request for it constitutes reversible error. See, *McAffee v. U. S.* (CA-DC), 105 Fed. (2d) 21, 32; *Meadows v. U. S.* (CA-DC), 82 Fed. (2d) 881, 883; *Hersh v. U. S.* (CCA-9), 69 Fed. (2d) 799, 807. See also, *Sealfon v. U. S.,* 68 S. Ct. 237, at 240, which holds that even if an appropriate instruction on a material issue is not proposed by the parties that it is nevertheless, the duty of the Court to give such an adequate instruction on that issue and its failure so to do constitutes reversible error. See also, *Bird v. U. S.,* 180 U.S. 350, 361-2; and *Calderon v. U. S.* (CCA-5), 279 Fed. 556, 558, declaring the general rule to be that the Court must give pertinent instructions when its attention is directed to the defendant's theory of the case.

(3) The trial Court erred in instructing the jury that an aider and abettor is a principal.

The trial Court erred in giving the following instructions to the jury to the effect that an aider or abettor is criminally liable as a principal.

(R. 185-186.) I further charge that whoever directly commits an act constituting an offense defined in any law of the United States, or whoever aids, abets, conceals, induces, or procures its commission, is a principal, and to be prosecuted and punished as such. In other words, whoever directly does the thing that is a violation of law is a principal, and is also one who either aids, abets, conceals, induces, or procures the doing of an act or that act.

"Aid" and I am defining these for you because the definitions are essential in the trial of this case—"Aid" means "to help, support, assist; one who helps or promotes in doing something; helper or assistant".

"Abet" means "to instigate or to encourage by aid or countenance; or to contribute; as an assistant or instigator in the commission of an offense".

"It is essential to the guilt of a person charged with aiding and abetting the commission of a crime that such person's acts shall have contributed to the effectuation of the offense. It is sufficient if it facilitated the result and rendered the accomplishment of the offense more easy.

"Usually to aid and abet in the commission of an offense, the person rendering such aid or assistance

is present to render support and confidence, but he may aid and abet even though absent.

"A person who renders assistance, cooperation and encouragement in the commission of an offense is one who aids and abets in the commission thereof."

Nowhere in the indictment is the appellant charged with having aided and abetted in the commission of any offense.

If the evidence showed anything, it showed De Bon did not and could not have joined in a common purpose with Osaki and Hildebrand, or with either of them, and had no intent to aid or encourage either of them and was not present at the making of the application, supplemental application or mail order requests. In consequence, there was no evidence that he aided or abetted them. He was not an accessory before the fact. See *Morei v. U. S.* (CCA-6) 127 Fed. (2d) 827, 830. Therefore, if the evidence discloses any connection whatever on the part of De Bon with the matter it could show, at most, that he was an accessory after the fact and hence he could not have been a principal and the instruction, given under 18 USC 550, was erroneous and prejudicial.

To be an aider or abettor under 18 USCA, sec. 550, in a felony case mere presence is not enough. There must be a common purpose and intent to aid or encourage the persons who committed the crime and an actual aiding and encouraging. An accessory before the fact is one who, though absent at the commission

of a felony, procures, conceals or commands annother to perpetrate it. Those present assisting are guilty as principals while those who are absent but who counseled it are accessories before the fact. An aider and abettor must be present when the crime is committed. If the evidence be deemed to show De Bon was an accessory after the fact the indictment fails for he was not so charged and there is a fatal variance between the charges brought and the crime proved. See *Morei v. U. S.*, supra.

(4) The trial Court erred in its statements of the law in response to questions put to the Court by the jury.

The Court erred in answering the following questions propounded by the jury to the Court, viz:

"(R. 202) The third question is, Can a dealer buy on a veteran's priority and sell to a non-veteran on a commission basis? That involves a mixed question of law and fact, and I regard the answer to that as completely removed from this case, because the transaction as elicited through the medium of the witnesses is either one thing or the other. * * *

(R. 203) The gravamen of this cause is not bottomed or predicated upon any sale. If there be a fraud perpetrated, it is in connection with the mail order sent to the War Assets, and other features of the transaction. No opprobrium attached to the alleged sale.

A Juror. If Mr. Hildebrand was a dealer, couldn't it be construed that a dealer is entitled to a commission for sale?

The Court: A dealer can deal in his own properties as such, but bear in mind in this case that Mr. Hildebrand was not dealing in his own priorities. Mr. Hildebrand was dealing in Osaki's priorities.

The Juror: What I mean is an innocent purchaser purchasing and paying commission, wouldn't that or couldn't that be constituted (considered?) a commission instead of—

The Court: That is for you. I am not to pass on that, sir. That is a matter for you to determine in the light of all the facts in this case.

The Juror: That is the reason we wanted to know what a dealer was.

The Court: I have defined it as best I can. I have given you the definition. I have read the Act."

The question whether a veteran dealer (Hildebrand) could buy on his own or his partnership's priority and thereafter sell to a non-veteran on a profit or commission basis was a question of law highly material to the issue involved. If such was permissible neither of the mail order requests, whether referable to Osaki's applications or viewed independently, could have been false in failing to disclose that the veteran purchaser then intended or later intended to resell the items to De Bon and no crime whatever was committed by any of the defendants.

The question whether Hildebrand was a veteran dealer, as the evidence disclosed he was in a partnership with a veteran engaged in the used car business

and that he informed De Bon that he was a veteran dealer, and, as such was entitled to a profit or commission on a sale, obviously required a jury instruction that a veteran dealer was entitled to a profit under such circumstances. The trial Court's answer that a dealer can deal in his own properties but that Hildebrand was not so doing but was dealing in Osaki's priorities was erroneous. That Court should have instructed the jury that if it found that De Bon believed in and relied upon the representation made by Hildebrand that he was a veteran dealer in partnership with a veteran in the used car business that Hildebrand and Osaki could charge De Bon a profit on the sales to him of the cars.

The trial Court's failure to answer the jurors' question whether or not an innocent purchaser could pay a commission or rather a profit on sales was an erroneous refusal to instruct on an issue of law involved in the case and raised by the evidence and was not a mere matter of fact to be determined by the jury.

Inasmuch as these questions of law were propounded by the jury to the Court and not by counsel for the defendant they were not excepted to, and, under the circumstances, the jury proposed them in lieu of the defendant and the Court erred in failing to give a proper instruction on this material issue. See *Bollenbach v. U. S.*, 326 U. S. 607, 612-4, where the Supreme Court stated:

> "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."

"A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

"A charge should not be misleading. See Agnew v. U. S., 165 U. S. 36, 52."

See also: *M. Kraus & Bros. v. U. S.*, 327 U. S. 614, 617.

CONCLUSION.

For the foregoing reasons we urge that the judgment of the Court below be reversed.

Dated, San Francisco, California,
January 5, 1949.

Respectfully submitted,
CHAUNCEY TRAMUTOLO,
Attorney for Appellant.

WAYNE M. COLLINS,
Of Counsel.

No. 11,841

IN THE

United States Court of Appeals

For the Ninth Circuit

ED DEBON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,
EDGAR R. BONSALL,
Assistant United States Attorney,
Post Office Building, San Francisco 1, California,
Attorneys for Appellee.

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U. S. Exhibits

No. 11,841

IN THE

United States Court of Appeals

For the Ninth Circuit

ED DEBON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

THE FACTS.

On June 11, 1947, an indictment was returned against Ed DeBon (appellant herein) and two co-defendants, Oscar Csaki and John Stephen Hildebrand (R. 2-9) charging them in three counts, the first count charging them with conspiracy to knowingly, and wilfully make and cause to be made and to present and cause to be presented false and fraudulent applications by veterans of World War II for the purchase of surplus war materials from the War Assets Administration (successor to War Assets Corporation) the said appellant knowing that the said applications were false, fraudulent and misleading and knowing that said applications were a matter within the jurisdiction of the War Assets Administration, the

intent and design of said appellant (and co-conspirators) being to obtain for the use and benefit of the appellant Ed DeBon war surplus property through priority certificates available only to veterans of World War II for the purpose of securing said surplus property, to-wit, various kinds of trucks and other automotive vehicles, and, notwithstanding a specific agreement with the War Assets Administration that any such war surplus property so secured was not being purchased for the purpose of resale, did, in fact, at all times, intend that title to the property should be secured for the use of appellant, Ed DeBon, who was then and there not legally entitled to, purchase said surplus property. It is further alleged in the indictment that the conspiracy continued from the month of March, 1946, up to the date of the filing of the indictment on June 11, 1947.

The third count of the indictment charges a violation of Title 18 USCA 80 in that on or about the 8th day of July, 1946, the said defendants in the City and County of San Francisco, did knowingly and wilfully make and cause to be made false, fraudulent and misleading statements and representations, and did conceal and cover up by scheme and device a material fact in a matter within the jurisdiction of a department or agency of the United States, to-wit, the War Assets Administration, in that the said defendants did cause to be executed a mail order request for the purchase of surplus property, to-wit, the purchase of one or more White van trucks, purported to be for the use and benefit of a veteran of World War II, one Oscar Csaki, when in truth and in fact it was the intention

of the defendants to purchase said one or more White van trucks for the use and benefit of the defendant Ed DeBon (appellant herein) who was not then and there legally entitled to purchase said property.

On July 11, 1947 (R. 11) the defendant Ed DeBon entered a plea of not guilty and requested a trial by jury. Defendant Hildebrand pleaded guilty to the first count of the indictment and, on motion of the government, the second and third counts were dismissed as to him. On July 29, 1947, the case came on regularly for trial before a jury. Defendant Oscar Csaki withdrew his plea of not guilty and entered a plea of *nolo contendere* to the first count of the indictment and, on the government's motion, the Court dismissed counts two and three of the indictment as to him. On July 31, 1947, the jury brought in a verdict as to defendant Ed DeBon of guilty as to counts one and three and not guilty as to count two. On the same day defendant Ed DeBon made a motion in arrest of judgment which was denied and on September 12, 1947, he made another motion for arrest of judgment and a motion for a new trial, which were denied. We may state that defendant Csaki was fined $250.00, and defendant Hildebrand was sentenced to three months' imprisonment, which was suspended, and probation for two years was granted, and a fine was imposed of $500.00. Defendant DeBon received a suspended sentence of six months, and was granted probation for 2 years and fined $2500.00 on each of the two counts on which he had been found guilty.

As a result of World War II, the United States had on hand a large amount of surplus property. In order

to prevent this property from being placed on the market, possibly threatening the economic stability of the country, Congress passed on Act known as the Surplus Property Act of 1944, providing for the orderly disposal of such property. (Title 50 App. Sections 1611 to 1646, inclusive.) (See Appendix.) Among other things, the Surplus Property Act provided that veterans should enjoy priority in the distribution of the property second only to that of the United States. This was provided in WAA Regulation 7, 8307.3. (See Appendix.)

The testimony of Frank A. Chambers, Chief of the Veterans' Branch of the Priorities Division of the War Assets Administration (Second Supplemental Transcript, p. 240) shows that in the orderly administration of the Act, veterans of World War II were extended a priority sequence in No. 2 place. They were preceded only by the Federal Government, the Federal Government having top priority. Veterans of World War II were in second place in the purchase of surplus commodities. (2nd Supp. R. 241.)

On July 8, 1946, the War Assets Administration had for sale the Chevrolet truck mentioned in the indictment, and the three White van trucks, also mentioned therein. The Chevrolet truck had been advertised for sale in a brochure (U. S. Ex. 11) June 25-26, administrative number of the sale being 45378. (2nd Supp. R. 244-245.) This sale was limited to veterans only (2nd Supp. R. 245, 256) and was known as a "set aside sale", such a sale being the sale of residual property on hand which had not been disposed of at

the time it was originally advertised for sale. (2nd Supp. R. 245.) The sale of such property was only to qualified World War Veterans. (2nd Supp. R. 246.) The three White trucks mentioned in the indictment were advertised for sale at what was known as a "cycle" sale. The sale was advertised as offering the property only to veterans until July 12, 1946. The sale was set for June 24 to July 12, 1946. (U. S. Govt. Ex. 12, 2nd Supp. R. 258.)

At the sale it was necessary for a veteran to have a priority certificate issued by the War Assets Administration. (2nd Supp. R. 262.) Prior to securing such a priority certificate, it was necessary that application be made on form 66. (U. S. Ex. 13; 2nd Supp. R. 260.) *It has been stipulated by counsel that appellant DeBon did not have a veteran's certificate necessary for him to purchase any of the trucks.* (R. 43.)

Ed DeBon, the appellant, has been engaged in the business of buying and selling automobiles, both new and secondhand, in Weed, Shasta City and Eureka, California. (R. 137.) He was familiar with the method in which the different branches of the automotive business were conducted. (R. 147.) He knew what documents had to be executed in connection with the sale of automotive property by the War Assets Administration. (R. 137, 147.) He visited the War Assets Administration about once a week to look for property offered for sale and to purchase such property as he was interested in (R. 137); that he had made such visits to the War Assets Administration for some fourteen or fifteen months; that he had purchased a

large amount of war surplus property in the past. (R. 137.) *He knew that as a dealer he could not buy the trucks mentioned in U. S. Exhibits 11 and 12* (R. 142); he knew that both of these sales were on priorities. (R. 150.)

According to the testimony of John Stephen Hildebrand, *appellant DeBon knew before the requests to purchase any of the trucks were mailed to the War Assets Administration on July 8, 1946, that it was necessary to use the priorities issued to Oscar Csaki in connection with these requests* (R. 58, 62); *that without the use of Csaki's priority certificates, DeBon could not have purchased any of the trucks.* (R. 65.) Csaki knew before the requests to purchase the trucks had been mailed to the War Assets Administration that his priorities were being used for the benefit of appellant DeBon. (R. 99.)

Appellant DeBon testified that he first met John Stephen Hildebrand on July 8, 1946. (R. 40, 138, 139.) He claims he was introduced to him as a dealer. (R. 142.) He does not state by whom, but he had no dealings with him as such a dealer.

If this testimony is accepted as true, it is difficult to understand what, if anything, DeBon knew concerning the activities of Hildebrand before that time. On or about December 11, 1945, Csaki had applied in writing to the War Assets Administration for the purchase of surplus property, for use in his own business and not for the purpose of resale (R. 54, 92, 93; U. S. Ex. 13), and had been given a priority status, but had not used his priority. (R. 92, 58.) Hildebrand

suggested to Csaki that he should exercise the right to use the residue of his priority (R. 33) and Csaki agreed to use it. (R. 32.) Pursuant thereto, on March 27, 1946, Csaki signed a supplemental veteran's application for surplus property, for use in his own business and not for resale. (U. S. Ex. 14; R. 31, 32, 92, 93, 94, 95.) Both Csaki and Hildebrand filled out this form. (R. 32, 35, 54, 56, 92, 93, 95, 96.)

Paragraph 18 of that form (U. S. Exhibits 13 and 14) contained a statement the applicant was not procuring the property for resale. (R. 261.) These forms were presented by Csaki and Hildebrand to the certification section of the War Assets Administration (R. 36) for certain items, that is, the Chevrolet truck and the three White van trucks. The War Assets Administration thereupon delivered to Csaki pink priority slips (U. S. Ex. 6; R. 36) for the three White van trucks listed in the application and Csaki delivered same to Hildebrand. (R. 96.)

Hildebrand once worked for the War Assets Administration. (R. 53.) The two, Hildebrand and Csaki, had discussed going into business sometime in the future and make use of their priorities. (R. 36, 37, 57.) They had abandoned this intention possibly as early as April, 1946 (R. 57), some three months before Hildebrand became acquainted with DeBon. (R. 40, 53, 57, 38, 39, 45.) Csaki first met DeBon on July 24, 1946. (R. 127, 128, 142.) Hildebrand first met DeBon in the office of the War Assets Administration at 30 Van Ness Avenue, San Francisco, on July 8, 1946. (R. 40, 138, 139.) DeBon says that

Hildebrand was introduced to him. (R. 142.) Hildebrand testified that at this time, "* * * I believe it came around that he wanted me to get him some units that were in that sale, if I could exercise a priority," (R. 40) and "I told him I would try." (R. 42.) Hildebrand did not own any of the trucks at the time.

DeBon had indicated from a brochure (U. S. Exs. 11 and 12) that he would like to obtain two Chevrolet gunnery trucks and as many White trucks as possible, which were listed in the brochure. (R. 41, 49, 50, 59, 139.) DeBon stated to Hildebrand that he was willing to pay him a profit of $50.00 apiece if he acquired the two Chevrolet trucks (R. 46) and $200.00 each for the three White van trucks. (R. 50.) Hildebrand then went to the Office of the War Assets Administration across the street at 1540 Market Street, San Francisco, where he filled out and submitted two applications, that is, mail order requests for the surplus property (U. S. Exs. 1 and 5; R. 42, 43), these requests being for the identical property previously designated by DeBon. (R. 42, 49, 50, 59, 139.) The first of these mail order requests (U. S. Ex. 1) was for a Chevrolet gunnery truck, mentioned in counts one and two of the indictment, which was a unit left over after the War Assets Administration sale advertised for June 25-26, 1946, had been concluded. (U. S. Ex. 11; R. 41, 42.) It was available as a left-over sale unit. (R. 42.)

According to the testimony of Frank A. Chambers, of the War Assets Administration, this left-over item was available only to a Veteran of World War II. (R. 245, 246.) This request for the Chevrolet gun-

nery truck was signed by Oscar Csaki, with initials "JSH" immediately under the signature. (R. 43.) At the time Hildebrand had not consulted Csaki about the use of his name, but did so that night and obtained Csaki's consent. (R. 43, 44.) The next day, July 9, 1946, Csaki went to the War Assets Administration's Office and there signed Disposal Document 10, dated July 8, 1946 (U. S. Ex. 2) ostensibly as a buyer. Copies thereof (U. S. Ex. 3) were signed in his name by War Assets Administration officers (U. S. Ex. 3), carrying the notation that on July 9, 1946, $1125.96 was paid for the Chevrolet gunnery truck. Oral evidence shows that Csaki paid this sum for the truck through the medium of a cashier's check, endorsed by DeBon, payable to the Treasurer of the United States, which DeBon had delivered to Hildebrand, who, in turn, delivered it to Csaki. Csaki then delivered the check to the War Assets Administration. (R. 48, 64.) The War Assets Administration issued a bill of sale, dated July 8, 1946, to Csaki, covering the purchase. (U. S. Ex. 4.) On July 9, 1946, Hildebrand told Csaki that he had arranged for DeBon to secure the truck, and at Hildebrand's request Csaki thereupon executed a bill of sale to DeBon (R. 150) which was delivered to DeBon by Hildebrand and DeBon got possession. Thereafter DeBon paid Hildebrand the sum of $50.00, in accordance with his prior agreement. (R. 150.) Several days after receiving the $50.00 Hildebrand gave Csaki $15.00 or $25.00 of the amount he had received from DeBon. (R. 100, 122, 126.)

DeBon, as heretofore stated, was familiar with the documents necessary to be executed in connection with the purchase of property from the War Assets Administration. (R. 147.) Hildebrand says he told DeBon that Csaki's priorities were being used before request was made to the War Assets Administration for the trucks. (R. 59.)

The second of these mail order requests, U. S. Exhibit No. 5, was for three White van trucks, mentioned in counts one and three of the indictment. These three White van trucks were available for purchase on July 8, 1946, only to honorably discharged veterans of World War II, as shown by U. S. Exhibit No. 12. (See testimony of Frank A. Chambers, Second Supplemental Transcript, page 259.) The second request to purchase on July 8, 1946, was in the name of Oscar Csaki by Hildebrand, who did not then have Csaki's permission to sign his name to said request, but obtained his permission that night (R. 51, 74) or, according to Csaki, several days later. (R. 100.) In any event, Csaki gave Hildebrand his oral consent to apply for one White truck and later was to learn from a notice he received from the War Assets Administration that he had been awarded three White trucks. (R. 101.) Csaki then went to the War Assets Administration and signed three Disposal Documents No. 10 (U. S. Ex. 8) on July 17, 1946. U. S. Exhibit No. 9, containing copies of said disposal documents are WAA copies of U. S. Exhibit 8. Exhibit No. 7 is a War Assets Administra-

tion memo concerning Csaki's desire to purchase three trucks.

At the request of Hildebrand, Csaki met Hildebrand and also DeBon at the office of the War Assets Administration at 30 Van Ness Avenue, San Francisco on July 24, 1946. This is the first time that Csaki met DeBon. (R. 101.) Hildebrand delivered to Csaki three Bank of America Cashier's checks, each in the sum of $3629.00 payable to the order of Ed DeBon, dated July 24, 1946, and bearing the endorsement of DeBon, payable to the order of the Treasurer of the United States, which DeBon delivered to Csaki. (U. S. Exs. 16, 17 and 18; R. 101, 103, 104, 143.) Csaki delivered them to the War Assets Administration in behalf of DeBon in payment of these trucks, using the checks furnished him by Appellant DeBon, and received from the War Assets Administration three bills of sale to him for the three White van trucks. (Ex. 10.) Thereafter Csaki executed a notarized bill of sale to DeBon (R. 101, 102, 143) covering the transfer.

DeBon paid Hildebrand $400.00 (R. 52) for engineering the transfer of the three White trucks. (U. S. Ex. 19, R. 140.) Later Hildebrand gave Csaki $120.00 of this amount. (R. 108, 109, 122, 126.)

It will be noted that at no time did Csaki see any of the trucks for which the sales documents had been issued to him by the War Assets Administration, or did he at any time ever have physical possession of any of the trucks. (R. 122, 123.)

The first count of the indictment charges a conspiracy to make false representations to the War Assets Administration. The third count charges the substantive offense of making false representations to the War Assets Administration.

Conceding, only for the purpose of argument, that Appellant DeBon thought in negotiating with Hildebrand, that he was, in fact, a dealer, this would in no way have any direct bearing on the charges in this indictment. A veteran dealer, or any other person, knowingly making false representations to the War Assets Administration, would be guilty of the substantive offense charged in the indictment, and if he knowingly conspired with others to do so, it would nevertheless make such persons guilty of the offense of conspiracy. Likewise, *any person* inducing another to make a wilful and false representation to the War Assets Administration, would be guilty of the substantive offense. *DeBon knew that the priorities of some veteran, named or unnamed, were necessary in securing these trucks,* and he says that he did know that such priorities were necessary. (R. 150.) Knowing these facts, he nevertheless induced and encouraged Hildebrand to secure the trucks in question for him, thereby aiding and abetting the commission of an offense, and being a principal.

On July 24, 1946, Appellant DeBon, obtained a cashier's check No. 2818883, drawn on the Bank of America in the sum of $500.00 (U. S. Ex. 19) payable to himself, and at once cashed the same at the issuing bank. (R. 151.) It is to be noted that this

check was dated and cashed on the same day as were the three cashier's checks drawn on the Bank of America, each in the sum of $3629.00 (U. S. Exs. 16, 17, 18), which were numbered 2818880, 2818881, 2818882, and that the first mentioned check No. 2818883, follows in sequence. He admits that part of the proceeds of this check for $500 was paid in cash to Hildebrand. (R. 152).

It is singular, indeed, that the payments to Hildebrand were not made by check. When first questioned by William B. Dillon, a special agent of the Federal Bureau of Investigation on February 3, 1947 (R. 157) DeBon was asked if he had paid the veterans (Hildebrand and Csaki) anything for the use of their priorities and he replied that he had paid them absolutely nothing.

When questioned a little more in detail about this remark, he then said:

> "Well, perhaps, I did pay them something—not very much, fifty to a hundred dollars—not over a hundred dollars." (R. 158.)

At the same time appellant was questioned in regard to any commitments he may have made to the veterans for their aid in securing these trucks for him. (R. 158.) He then stated to Agent Dillon that he had paid them $20.00 or $30.00 each to cover their expenses only, that they had gone to either Stockton or Sacramento, or both, to the War Assets Depot where these vehicles were parked, to examine them, and he reimbursed them only for their expenses,

and that they were of a minor character, and on the whole they would not exceed $150.00, and he repeated this statement on two or three occasions. (R. 158.)

THERE IS AMPLE EVIDENCE IN THE RECORD TO SUSTAIN THE VERDICT OF GUILTY.

The testimony disclosed that the appellant had purchased a considerable amount of automobile property from the War Assets Administration. (R. 137, 147.)

He visited the War Assets Administration about once a week to look over the property for sale, and purchased such property as he was interested in. (R. 137.)

He had made three visits to the War Assets Administration covering some 14 or 15 months. (R. 137.)

He knew what documents were necessary in connection with the sale of automobile property from the War Assets Administration. (R. 137, 147.)

He knew that in connection with the sale of the Chevrolet truck and the three White van trucks, it was necessary to have veteran's priority certificates issued by the War Assets Administration. (2nd Supp. R. 262.)

It has been stipulated by counsel that DeBon did not have such priorities. (R. 43.)

Appellant knew that as a dealer he could not buy the trucks mentioned in the indictment (U. S. Exs. 11 and 12; R. 142) and he knew that both of these sales were on priority. (R. 137.)

He had seen a brochure similar to Government's Ex. 11, advertising the trucks and trailers for sale to Veterans in June 25-26, 1946, and a brochure similar to U. S. Exhibit 12, entitled "Trucks over 2½ ton and Truck-Tractors for sale Federal Agencies—June 3-17 and Veterans World War II, June 24-July 12 * * *" (R. 41, 49.)

There was the testimony of Hildebrand that DeBon had indicated to him what property catalogued in U. S. Exhibits 11 and 12 he desired, that is to say, the Chevrolet truck and the three White van trucks. (R. 42, 49, 50, 59, 139.)

We have the testimony of Hildebrand that DeBon, prior to the time request was made to the War Assets Administration for the purchase of the trucks, had been told that Csaki's priorities would be used in the transactions. (R. 59.)

We have the testimony of Csaki that Hildebrand told him that his priorities were being used in securing these trucks before he made request for same from the War Assets Administration. (R. 99.)

At no time did Csaki inspect the trucks or had physical possession of the trucks. (R. 122, 123.)

There were transactions completed at two different times between DeBon and Hildebrand and in each of which Csaki's priorities were used: On July 8, 1946, in connection with the Chevrolet truck and on July 24, 1946, in connection with the purchase of the three White van trucks. DeBon was using the priorities of Csaki and not those of Hildebrand. (R. 59.)

Payment for the three White van trucks was made by DeBon by three cashier's checks, payable to him, and by him endorsed to the Treasurer of the United States, each in the sum of $3629.00. (U. S. Exs. 16, 17, 18.) Hildebrand was paid around $400 for his part in the transaction involving the White trucks. (R. 52.)

Payment for the Chevrolet truck was made by cashier's check (R. 140) and at that time Hildebrand was paid $50.00.

The question whether or not DeBon had knowledge of the filing of the requests to purchase the Chevrolet truck (U. S. Ex. 1) and the three White van trucks (U. S. Ex. 5) was one of fact for the jury.

Takahashi v. United States (CCA Wash., 1944), 143 F. (2d) 118;

United States v. Goldsmith (CCA N. Y., 1943), 137 F. (2d) 393, cert. denied 64 S. Ct. 190; 320 U. S. 781, 88 L. Ed. 469, rehearing denied 64 S. Ct. 259, 320 U. S. 814, 88 L. Ed. 492;

United States v. Presser (CCA N. Y., 1939), 99 F. (2d) 819;

United States v. Breen (CCA N. Y., 1938), 96 F. (2d) 782, cert. denied 58 S. Ct. 1061, 304 U. S. 585, 82 L. Ed. 1546.

ARGUMENT.

(1) In the statement of the case, appellant in his brief, attempts to limit criminal responsibility to Hildebrand and Csaki by stating that the false application was prepared by these veterans and not by DeBon.

On page 5, of the brief, it is said: "If this document contained false statements and data (R. 88) it was placed thereon by Hildebrand and Csaki. (R. 55, 56, 93, 94, 95, 96.)" While it is true that the veterans actually prepared the false application, it is also true that they did so at the behest of DeBon who was financing the purchase of surplus trucks. One who knowingly induces another to commit a crime, is guilty as a principal.

McCoy v. United States (Montana, CCA-9th), 169 F. (2d) 776, cert. denied Dec. 20, 1948, U. S. S. Ct.;

Todorow, et al. v. United States (CCA-9th), decided Feb. 15, 1949, No. 11,629;

Harris v. United States (CCA N.Y., 1921), 273 F. 785, cert. denied 1921, 42 S. Ct. 180, 263 U. S. 717, 68 L. ed. 414.

On page 6 appears the sentence: "Hildebrand first became acquainted with DeBon in July, 1946." (R. 40, 53, 57, 38, 39, 45.) Csaki first met DeBon on July 24, 1946. (R. 127-128, 142.) According to Hildebrand he met DeBon shortly before that date, in June, 1946. (R. 40.)

On the same page it is stated: "Hildebrand, without informing DeBon, went alone to the WAA office across the street at 1540 Market Street where he filled out and submitted two applications, that is to say 'mail order requests for surplus property', Exhibits 1 and 5. (R. 42, 43.) There are no false statements in either of these requests. Unless it is contended that Csaki was not to receive title thereto from the WAA, which, obviously, is not the case, the requests neither expressly nor impliedly were false."

It is true that Csaki intended to take legal title to the Chevrolet and White trucks, but it is not true that he intended to take equitable title nor to retain legal title beyond the brief moment necessary to acquire the property from the Government for DeBon. In testing whether an offense was committed, the Government must reach for the substance of the transaction and not the mere form which constituted a subterfuge whereby a man not entitled to obtain surplus property was able to do so by using a veteran's priority and having the veteran take legal title, long enough to acquire the property from the Government.

McCoy v. United States, supra;
Todorow v. United States, supra.

DeBon designated the articles he wanted from U. S. Exhibits 11 and 12 on July 8, 1946 and before the requests to purchase were submitted to the War Assets Administration for these particular items. (U.

S. Exs. 1 and 5, R. 41, 51.) He knew he was not entitled to buy as a dealer. (R. 142.) He knew that priorities were necessary to purchase these trucks. (R. 150.) There is a stipulation in the record that he did not have such priorities. (R. 43.)

Immediately after Csaki paid for the trucks with checks supplied by DeBon, Csaki conveyed the trucks to DeBon by executing a bill of sale. (U. S. Exs. 4 and 10.) According to Hildebrand, he was roughly paid $400 in connection with the transaction involving the three White trucks (R. 52) and $50.00 in connection with the transaction involving the Chevrolet truck. (R. 47.) Out of these payments Hildebrand gave a part to Csaki for the use of his name. (R. 109.) Despite these facts, which cannot be disputed, appellant's brief states on page 7: "There is not an iota of evidence in the record (that DeBon ever knew, heard, saw or authorized the making or filing of the requests for trucks)."

On page 8, it is stated: "The next day, July 9, 1946, Csaki went to the WAA office and there signed Disposal Document No. 10, dated July 8, 1946, Exhibit 2, as a buyer." Actually DeBon was the real buyer who obtained immediate equitable title to the cars, despite the transfer of legal title to Csaki. Farther down the page, appellant states: "DeBon never knew that Csaki's personal priorities had been used to procure this Chevrolet truck. (R. 150.)"

There is evidence in the record to the contrary. The testimony of Hildebrand in this regard is: "He

(DeBon) knew I was using Csaki's priorities, and I told him so." (R. 59.) (Name in parentheses supplied.)

On page 11, in setting forth the question involved on appeal, the brief states with reference to the mail order request that it "contained no false statements but was filed by the veteran dealer with the WAA in the name of his partner". Actually the application did contain a false statement inasmuch as it stood in the name of Csaki and failed to disclose the name of DeBon who was the actual buyer of the trucks and who was to obtain an immediate conveyance from Csaki as soon as he acquired title to the property.

McCoy v. United States, supra;
Todorow v. United States, supra.

The further question is asked as to whether the conviction, etc., does not constitute double jeopardy under the two counts because they are duplicitous as to persons, times, etc. The answer to this question is that two separate and distinct offenses were charged and were the basis for separate findings of guilt: obtaining government property by fraud and conspiring to obtain the property.

United States v. Bayer (N.Y., 1947), 67 S. Ct. 1394;
Upshaw v. United States (CCA Okla., 1946), 157 F. (2d) 716;
Taub et al. v. Bowles (Em. App. 1945), 149 F. (2d) 817, cert. denied 66 S. Ct. 39, 226 U. S. 732, 90 L. ed. 435;

Banghart, et al. v. United States (CCA North Carolina, 1945), 148 F. (2d) 521; cert. denied 65 S. Ct. 1568, 325 U. S. 887, 89 L. Ed. 2001; rehearing denied 66 S. Ct. 133, 326 U. S. 807, 90 L. ed. 492;

Pinkerton v. United States (Del., 1946), 66 S. Ct. 1180, 328 U. S. 640; 90 L. ed. 1489, rehearing denied 67 S. Ct. 26; see also,

Blumenthal v. United States (CCA Cal., 1946), 158 F. (2d) 762, rehearing denied 158 F. 883, cert. denied 67 S. Ct. 1307.

In the assignment of errors appellant on page 13, specifications 12, 13 and 14 states: "12. The trial Court erred in refusing to instruct the jury, in response to its inquiry, that a veteran dealer could buy surplus property on his priority and sell to a non-veteran at a profit. (R. 202.)"

"13. The trial Court erred in refusing to instruct the jury, in response to its inquiry, that a veteran dealer could sell purchased surplus property to a third person for a profit or for a commission. (R. 205.)"

Since Csaki was, in fact, not a veteran dealer (R. 124) and the record discloses no meeting between Csaki and DeBon until July 24 or 25, 1946 (R. 127-128), such requested instructions were irrelevant and misleading, and it was proper for the Court to refuse to give them. *Actually, there was a complete agreement by both sides in the presence of the Court as to the instructions that were to be given and it*

was understood to the satisfaction of counsel for the defendant, that such instructions were not appropriate and would not be given. (R. 195.)

"14. The trial Court erred in instructing the jury that one who aids and abets an offense is criminally liable as a principal. (R. 185-6.)"

The record shows that DeBon furnished the funds making the completion of the crime possible. Under these circumstances, it was incumbent upon the Court to instruct the jury on the subject of aiding and abetting in the commission of a crime.

Perrin v. United States (CCA N.Y., 1922), 279 F. 253;

Colbeck v. United States (CCA Ill., 1926), 10 F. (2d) 400; cert. denied *Hackenthal v. U. S.* (1926), 46 S. Ct. 471; 270 U. S. 663, 70 L. ed. 788;

Colbeck v. United States (1926), 46 S. Ct. 474, 271 U. S. 662; 70 L. ed. 1138;

Lanham, et al. v. United States (1926), 46 S. Ct. 474, 271 U. S. 662, 70 L. ed. 1138;

Borgia v. United States (CCA Cal., 1935), 78 F. (2d) 550; cert. denied 56 S. Ct. 135, 296 U. S. 615, 82 L. ed. 436.

See also

McCoy v. United States, supra;

Todorow v. United States, supra.

In appellant's analysis of the evidence of fraud, the statement appears on page 16 of his brief that the indictment is fatal because it fails to allege spe-

cifically the statement or statements in the veteran's application for surplus property which were false. Recent cases hold that such specific statements are no longer necessary to sustain an indictment.

> *United States v. Goldsmith* (CCA N.Y., 1940), 108 F. (2d) 917; cert. denied 80 S. Ct. 715; 309 U. S. 678, 84 L. ed. 1022, rehearing denied 60 S. Ct. 1073, 310 U. S. 657; 84 L. ed. 1420, 61 S. Ct. 956, 313 U. S. 599, 85 L. ed. 1551.

On the same page, the brief states: "Csaki was entitled to purchase the property and to pass title to a third person."

Such statement is inaccurate and contrary to the language appearing in the veteran's application (U. S. Exs. 13 and 14) which limits war assets sales to veterans who intend to use the purchased articles for their own use unless they be dealers in the particular merchandise, and is also contrary to the advertising appearing in the brochures. (U. S. Exs. 11 and 12.) Csaki neither intended to use the trucks himself nor was he a dealer entitled to convey the property and pass title to a third person.

In the next paragraph on page 16 of the brief, Count 3 is declared to be void for duplicity because it appears to allege an offense conjunctively against the defendant charging that he did "make and cause to be made" a false statement *and* did conceal "a material fact" within the jurisdiction of the War Assets Administration. While such use of the statu-

tory language is not desirable, it is not fatal to the cause of action set forth in Count 3, since the use of the conjunctive does not give rise to true duplicity. The "and" merely creates a repetitious method of stating a single offense against DeBon, namely, making a false statement by using Csaki's name on the application and by that fact concealing his own name. Thus, a single offense is charged in Count 3.

Bridges v. United States (Montana, 1905), 140 F. 577;

United States v. Franklin (CCA N.Y., 1909), 174 F. 16; writ of error denied;

Franklin v. United States (1910), 30 S. Ct. 434, 216 U. S. 559, 54 L. ed. 615;

United States v. Hull (D.C. Neb., 1882), 14 F. 324.

Continuing its attack on the third count, the brief states on page 17, in discussing this count, "It also contains no allegation of the nature of the 'material fact' which was concealed and therefore fails to state an offense."

The indictment charges in general language the fraudulent use of a veteran's name. Such general charge carries with it by implication the concealment of the real party in interest, for whom the name of Csaki appeared as a front. Such charge is sufficient in view of the liberal interpretation of the requirements for a valid indictment today. See

McCoy v. United States, supra;

Todorow v. United States, supra;

United States v. Goldsmith, supra.

On the same page, the further statement appears: "There was no duty upon Csaki to state (in the application) that at the time he applied to purchase that he intended to resell the trucks at that time or at any future time."

Such a statement is contrary to the printed matter appearing in the application itself which required a veteran purchaser to be the sole user and promise not to resell the surplus property being purchased. (Exs. 13 and 14.)

Appellant alleges on page 18 of his brief that the Government is not competent to establish a fraudulent offense against DeBon under Title 18, USCA 80, because it cannot and could not show any detriment suffered by it when it made the sale to Csaki.

Such is not the test of determining fraud on the part of DeBon and his co-conspirators in preparing a fraudulent request to purchase surplus property. The government is not required to show pecuniary loss in connection with a fraud charge.

United States v. Goldsmith, supra;

United States v. Heine (CCA N.Y., 1945), 149 F. (2d) 485, cert. denied 65 S. Ct. 1578, 325 U. S. 885, 89 L. ed. 430;

United States v. Presser (CCA N.Y., 1939), 99 F. (2d) 819.

The appellant's argument that the conspiracy charge must also fail because of the defect in the substantive offense, is accordingly without merit and does not warrant discussion.

Appellant contends that there is no evidence that DeBon conspired to make false applications (Exs. 13 and 14) or that he instigated the requests to purchase the trucks. (Exs. 1 and 5), (page 20, appellant's brief.)

It is true that when the original applications were filed by Csaki they were not false. However, the crime is not completed when the application is filed; it is consummated when the application is used to perpetrate a fraud. Thus, as Csaki filed his applications in good faith in December, 1945, and March, 1946, there was no wrongdoing until Hildebrand met DeBon and entered into the agreement which was completed with the misuse of the applications for the benefit of DeBon.

With respect to the conspiracy itself, the crime was not completed with the mere filing of the applications. It was of a continuing nature until the purpose for which the conspiracy was entered was completed with the misuse of the applications to enable DeBon, who supplied the funds, to obtain the trucks. This is the answer to appellant's assertion on page 21 of his brief.

Appellant asserts that there is no evidence of any knowledge on the part of DeBon of an agreement between himself and Hildebrand or Csaki for the acquisition of the trucks. Such is not the case.

With respect to the statement made on page 22 of appellant's brief, that the prosecution, in effect, is charging that the conspiracy, originally entered

into between Csaki and Hildebrand, was reopened so as to include DeBon up to and including the time Csaki passed title to DeBon after the purchase of the trucks, there is evidence to support this theory.

Nyquist v. United States (CCA Mich., 1924), 2 F. (2d) 504; cert. denied 1925, 45 S. Ct. 508, 267 U. S. 606, 69 L. ed. 810;

Blue v. United States (CCA Ohio, 1943), 138 F. (2d) 351; cert. denied 64 S. Ct. 1046 (3 cases), 322 U. S. 736, 88 L. ed. 1570; rehearing denied 64 S. Ct. 1259 (3 cases), 322 U. S. 771, 88 L. ed. 1596.

A person may enter a conspiracy after its original inception by others if he has knowledge of the facts in connection with such conspiracy, intends to participate therein and thereafter performs some overt act in connection therewith.

Rudner v. United States (CCA Ohio, 1922), 281 F. (2d) 516; cert. denied (1922), 43 S. Ct. 95, 260 U. S. 734, 67 L. ed. 487;

Hagen v. United States (Wash., 1920), 268 F. 344; cert. denied (1921), 41 S. Ct. 323, 255 U. S. 569, 65 L. ed. 790.

The record shows that DeBon did join in an unlawful agreement. Appellant's authorities requiring such joinder to make a party guilty of conspiracy are not disputed. (Appellant's Br. p. 22.) On page 24 of appellant's brief, it is stated that "Nothing in these mail order request forms supplied by the WAA required * * * disclosure therein (of the use to be put of the items purchased)."

This is contrary to the language found in the applications which requires the veteran to use the goods himself. (U. S. Exs. 13 and 14.)

Appellant contends that the evidence is insufficient to connect DeBon with the conspiracy. His authorities (p. 25 of his brief) are valid, but the record supports a different conclusion from that which he reached.

On page 26, of his brief appellant states: that "The evidence is conclusive that Hildebrand personally, without the knowledge of Csaki or DeBon, prepared both mail order requests (Exhibits 1 and 5) and later had Csaki orally approve his making of these requests."

Appellant overlooks the fact that these two mail order requests (Exhibits 1 and 5) were filled out after DeBon had seen the brochures advertising the sale (Exhibits 11 and 12) and had designated in these brochures to Hildebrand the property he desired to obtain.

On the same page appellant states that there is lack of "evidence that the sale by the WAA was restricted to veterans or that there was any prohibition against resale to a non-veteran."

As already stated, the application itself has language in it which limits the use of the goods purchased. The name appearing in the application was that of a veteran, and DeBon made no effort to purchase as a non-veteran. The data set forth on page 27 of Appellant's brief, in which a dealer's applica-

tion for property is quoted is irrelevant to this case. The statement made on page 28 of Appellant's Brief that "There is no doubt DeBon thought he was dealing with a duly licensed veteran dealer of used cars," is not supported by the record. DeBon testified that he first met Hildebrand on July 8, 1946. (R. 53.) Consequently it is fair to assume that he had had no dealings with him before that time.

While in his brief appellant contends that he was introduced to Hildebrand as a veteran dealer, the following testimony appears on page 138-139 of the record:

> Q. * * * When did you first, or did you know John Hildebrand?
>
> A. I met him on July 8, 1946.
>
> Q. And where did you meet him?
>
> A. Van Ness Avenue.
>
> Q. And was that a prearranged meeting, or was it just accidental?
>
> A. Accidentally.
>
> Q. You say you met him where?
>
> A. At 30 Van Ness Avenue.
>
> Q. At the War Assets Administration?
>
> A. That's right.
>
> Q. What was he doing there at the time you met him?
>
> A. I couldn't tell you. He was walking in and out of the building, and someone introduced me to him, and we got to talking about trucks and so on, and the conversation come up regarding he had a couple of trucks that he couldn't use. He asked me if I could use them. I told him I probably could, that I am in that line of

business. We finally that afternoon got together and I told him I will take the trucks, and I purchased those two Chevrolet trucks.

Q. You purchased the two Chevrolet trucks—

A. In the meantime he told me he had two or three others that he had applied for that was coming up and he couldn't use, and if I might could use them he was willing to sell them, and I told him, "If you can't use them I will buy them and take them off your hands and give you a little profit."

The charge that "Csaki's affidavit was not proved false in any material respect" hardly merits discussion since Csaki pleaded guilty to this very charge and such proof on the part of the Government would have been redundant.

In contending that the Government failed to sustain its burden of proof, appellant has pinned his case on the fact that Csaki acquired title to the trucks as a purchaser. (Appellant's Br. 29.) As already stated equitable title is controlling in a transaction such as that carried out by Hildebrand and Csaki who were not dealers in used cars at the time of the transaction with DeBon. (R. 90.)

With respect to the statement on page 30 of Appellant's brief that an agreement between DeBon and Csaki for the purchase and sale of the trucks could be perfectly legitimate and could not be violations of law perpetrated by Csaki is not so. See

McCoy v. United States, supra,

Todorow, et al. v. United States, supra.

Since DeBon had knowledge of the illegal transaction, he could not acquire good title through Csaki.

On the same page appellant states that the prosecution did not prove Hildebrand's lack of authority and DeBon's knowledge of this lack. Hildebrand admitted his lack of authority when he pleaded guilty, and since showed that DeBon had knowledge of Hildebrand's illegal methods and means. The record further shows that appellant's statement on page 31 of his brief that "The evidence was uncontradicted and conclusive that DeBon dealt with Hildebrand in the belief that Hildebrand was * * * a veteran dealer * * *" is also contrary to testimony adduced at the trial.

DeBon was dealing with priorities of Veteran Csaki. If he did not know Csaki personally, he at least knew that the priorities of some veteran were being used. Hildebrand's testimony seems to fairly imply that while his name was nominally listed as a veteran dealer with the War Assets Administration, he was not actually engaged in the business of a dealer at the time that he met DeBon in June or July of 1946. (R. 96.)

The charge that the prosecution made reversible error in summarizing his case to the jury wherein it was charged that DeBon had engaged in other conspiracies (Appellant's Br. p. 31) is without merit in view of the Court's admonition to the jury to disregard the statement. To allege that the Court's language was insufficient to correct what constituted an incurable blunder is nonsense. Following the statement that there may have been other conspir-

acies here, counsel was interrupted by the Court and the Jury admonished to disregard this statement of counsel, after which counsel for prosecution continued with the following statement:

"What I had in mind, ladies and gentlemen, was to confine you to the facts in this case, the one Chevrolet truck and the three White trucks, and not to consider any other trucks in relation to the matter." (Supplemental R. p. 226.)

Appellant contends that counts 1 and 3, charging, respectively, conspiracy and making fraudulent applications, set forth one and the same offense and that conviction of a crime contained in count 1 exhausts the jurisdiction of the court. (Appellant's Br. p. 33.)

Such an argument would eliminate the crime of conspiracy in innumerable cases in which the illegal agreement to commit a crime, consummated in an overt act, establishes the basis for a conviction of the substantive offense with which the conspiracy is connected. While it is true that the purport of counts 1 and 3 appears to be very similar, the two counts are distinguishable and the Court had jurisdiction to impose separate punishment for the two offenses. See

Bridges v. United States, supra,
Pinkerton v. United States, supra,
Blumenthal v. United States, supra.

With respect to appellant's criticism of the instructions to the jury: the comment made on page 35 of Appellant's Brief that "There is a wide difference between the weight to be given to the testimony of persons asserted to be accomplices and convicted co-

defendants," deals with a judicial refinement that hardly justifies serious comment. In the first place it should be noted that all instructions were approved by counsel before they were presented to the jury. (R. 195-197.) Any oral questions raised by the attorney for defendant were superseded by the general agreement reached by all parties concerned. According to the rules (Rule 30, Rules of Criminal Procedure for the District Courts of the U. S. effective Mar. 21, 1946—see appendix) a failure to except to instructions prior to presentation to the jury, constitutes a waiver of any objection that may be made to such instructions. In the particular complaint raised on page 35 of Appellant's brief, there is obviously no merit. The Court advised the jury to receive the testimony of accomplices with caution. The fact that the accomplices pleaded guilty and thus became codefendants, hardly destroys the import of the language used by the Court.

Appellant objects to the Court's failure to give an instruction on the theory of the case whereby DeBon was dealing with a regular veteran dealer. (Appellant's brief p. 37.)

In the first place, it should be noted that here, too, counsel for DeBon acceded to the instructions given by the Court and did not except to a failure to give such an instruction. (R. 197.) In the second place, it would appear that while Hildebrand's name appeared in the record of the War Assets Administration as a veteran dealer, it further appears that at time he met DeBon on July 6, 1946 and thereafter, he was not so engaged. (R. 90.) Therefore the facts

presented to the jury did not give rise to any legal problem connected with the purchase of trucks from a dealer. The record will show that there was no actual break in passage of ownership from the Government to DeBon with the exception of bare legal title resting in Csaki for a sufficient length of time for him to pass DeBon's money to the War Assets Administration and obtain the trucks which he immediately conveyed to DeBon on a bill of sale. There was no resale transaction and there was no duty for the Court to instruct on such a subject.

Appellant further criticizes the Court on pages 38 and 39 of his brief for presenting an instruction on the meaning of an aider and abettor. Aside from the fact that counsel for DeBon agreed to such an instruction (R. 195-197) the language used by the Court was certainly relevant in explaining the meaning of the conspiracy charged in the first count of the indictment. Since DeBon actually paid the money for the trucks, there is little doubt that his purchase made possible the entire transaction and that his conduct might well be described within the language used by the Court in its description of an aider and abettor.

Appellant again criticizes the Court's response to certain questions put by the jury. (Br. 40-41-42.) The language quoted referring to the record, pages 202 and 203, is a correct statement of the law and does not require justification. Further the Court's reply to the juror who sought to ascertain the significance of a purchase by an innocent purchaser, in which it was said that the question was one of fact, was a sound

treatment of this problem. The juror did not want an explanation of the meaning of an innocent purchaser, and from his question the Court could gather that he understood the significance of such a purchase if it had occurred as a matter of fact. The whole subject of sales by veteran dealers was properly covered by the Court in relation to the evidence adduced at the trial.

As frequently noted above, the veterans were not dealers, and the evidence disclosed the fact that DeBon was using them to acquire trucks he was not entitled to purchase himself. The Court's response to the juror's questions was all that could be expected under the circumstances and certainly did not constitute error of any kind.

CONCLUSION.

From the foregoing reasons, the appellee contends that the judgment of the Court below should be affirmed.

Dated, San Francisco, California,
February 23, 1949.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney.

EDGAR R. BONSALL,
Assistant United States Attorney.

Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Rule 30, *Rules of Criminal Procedure for the District Courts of the United States,* effective March 21, 1946.

At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the Court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

PART 8307—PREFERENCES FOR VETERANS.

Surplus Property Board Regulation 7, May 29, 1945, as amended to August 3, 1945, entitled "Preferences for Veterans" (10 F. R. 6519, 9119, 9886) is hereby revised and amended as herein set forth as Surplus Property Administration Regulation 7.

* * * * * * *

Sec. 8307.1 Definitions—(a) Terms defined in act. Terms not defined in paragraph (b) of this section

which are defined in the Surplus Property Act of 1944 shall in this part have the meaning given to them in the act.

(b) Other Terms. (1) "Own" business or professional or agricultural enterprise means one of which more than fifty (50) per cent of the invested capital or net income thereof is owned by, or accrues to, a veteran or veterans. A veteran may be deemed to have his "own" business or professional or agricultural enterprise for the purpose of acquiring particular tools or equipment when he is engaged by others as an employee or agent and is required by his employment to have his own tools or equipment.

(2) "Small business" may include any commercial or industrial enterprise, or group of enterprises under common ownership or control, which does not at the date of purchase of surplus property hereunder have more than five hundred (500) employees, or any such enterprise which by reason of its relative size and position in its industry is certified by Smaller War Plants Corporation, with the approval of the Surplus Property Administrator, to be a small business.

(3) "Veteran" means any person in the active military or naval service of the United States during the present war, or any person who served in the active military or naval service of the United States on or after September 16, 1940, and prior to the termination of the present war, and who has been discharged or released therefrom under honorable conditions. Veterans "released" from military or naval service shall include persons on terminal leave or final furlough and

those whose status has been changed from "active" to "inactive".

Sec. 8307.2 Scope. This part shall apply to disposals to veterans of surplus property located in the continental United States, its territories and possessions. It shall not apply to real property, industrial plants, shipyards and facilities, property designated in classes (1) to (8), inclusive, in Section 19(a) of the Surplus Property Act of 1944, or surplus vessels which the Maritime Commission determines to be merchant vessels or capable of conversion to merchant use.

Sec. 8307.3 Preference. Veterans shall be given a preference, subordinate to the rights of Government agencies and State and local governments, to purchase surplus property for use in their own small business, agricultural and professional enterprises. Such preference shall extend to property necessary to establish and maintain their own small business, agricultural and professional enterprises, and, within reasonable limits commensurate with the enterprise established or to be established and in commercial lots appropriate to the level of trade, to one initial stock of property to be resold with or without processing or fabrication in the regular course of business. In order to accomplish equitable distribution the Smaller War Plants Corporation in collaboration with the disposal agencies and with the approval of the Administrator may establish minimum and maximum limits as to the value and quantity of property which may be purchased by preference by any veteran.

Sec. 8307.4 Manner of exercising preference: application to Smaller War Plants Corporation. A veteran desiring to exercise his preference hereunder shall apply to any office of the Smaller War Plants Corporation and shall furnish the Corporation with complete information regarding the property desired. Smaller War Plants Corporation shall satisfy itself through reference to the applicant's discharge papers or to other satisfactory evidence that the applicant is a veteran and that the property applied for is to be used in his own small enterprise, and shall require of the applicant a supporting statement or affidavit. Smaller War Plants Corporation shall issue a certificate to such veteran stating that he is a veteran entitled to preference in the purchase of the types and quantities of the property described therein. Smaller War Plants Corporation shall also assist the veteran by referring him to the appropriate disposal agency, and, by agreement with the veteran, may act as his agent in purchasing the property certified. Disposal agencies shall rely upon the certificate of the Smaller War Plants Corporation that the holder is a veteran entitled to preference in the purchase of the types and quantities of the property described therein. Purchases under preferences accorded veterans shall be filled from reserves or other property made available to Government Agencies under Part 8302.[1] Property available for veterans may be inspected by them. Whenever a disposal agency receives an application from a veteran desiring to exercise his preference

[1]SPB Rev. Reg. 2 (10 F. R. 12121).

hereunder but not accompanied by a certificate from the Smaller War Plants Corporation, it shall refer the application to Smaller War Plants Corporation together with full information regarding the availability of the property and the price, terms, and conditions of sale.

SURPLUS PROPERTY ACT. (Title 50, Sec. 1611.)

* * * * * * *

(e) to foster and to render more secure family-type farming as the traditional and desirable pattern of American agriculture.

(h) to assure the sale of surplus property in such quantities and on such terms as will discourage disposal to speculators or for speculative purposes.

(q) to prevent insofar as possible unusual and excessive profits being made out of surplus property.

Title 50, Sec. 1625. Disposition to Veterans.

The Board shall prescribe regulations to effectuate the objectives of this Act (Sections 1611-1646 of this Appendix) to aid veterans to establish and maintain their own small business, professional, or agricultural enterprises, by affording veterans suitable preferences to the extent feasible and consistent with the policies of this Act (such sections) in the acquisition of the types of surplus property useful in such enterprises. (Oct. 3, 1944, c. 479, Sec. 16, 58 Stat. 773.)

No. WAA-SF-29 War Assets Administration, S.F.

L.P

MAIL ORDER REQUEST FOR SURPLUS PROPERTY

(This Form Must Be Made Out In Triplicate) 10-A-25255

Chief, Veterans Preference Unit
War Assets Administration
540 Market Street
San Francisco 2, California

July 8 1946
(Date)

If available, I desire to purchase 1 (indicate number) of the items below in order of my preference, and offered in Sale Number 45878
Sale Date is July 25-26 1946.

ce	WAA Decl. No. (CEO File No.)	Item No.	Tag No.	Page No.	Price	Items Awarded
	26396	289	81	26	$1125.00	

DO NOT WRITE IN THIS SPACE

Attached is my original Veteran's Preference Certificate, Case No. _____,
tems desired.

I hereby certify that I have personally inspected the aforementioned items,
sted, and understand that all purchases are on an "AS IS" and "WHERE IS" basis,
ut recourse. I am prepared to make payment upon notification of award and re-
for payment.

Oscar Csaki
(Signature of Veteran)

SURE

35617
38617

OSCAR CSAKI
5 ROTTECK ST.
ate SAN FRANCISCO

← PLEASE PRINT OR TYPE YOUR NAME AND MAILING ADDRESS IN THE LOWER LEFT HAND CORNER OF THIS FORM.

25.

1 - SALES FILE COPY

WAR ASSETS ADMINISTRATION

~~RECONSTRUCTION FINANCE CORPORATION~~

CONSUMER GOODS DIVISION

DISPOSAL DOCUMENT NO. 10 — 147895

DATE: JULY 8, 1946

SHEET NO. 1 OF 1 SHEETS

CE: ANCISCO

7 DW

S1008-19-8-7

AGENCY	LOCATION	FILE NO.	OWNING AGENCY DOCUMENT NO.	CONTRACT NO.	PURCHASE AUTHORITY NO.	BILL OF LADING NO.	
2131	306	26396		28617			SEC. 2

BALANCE DUE	DATE BALANCE DUE	DISPOSAL CODE	TRANS. CODE	SALE NO.	ENCUMBRANCE NO.
		131		45378	

#10-A-25255
R CSAKI
OTTECK ST.
FRANCISCO, CALIF.

DECLARING AGENCY
AAF 1008 - SATSC
MCCLELLAN FIELD
SACRAMENTO, CALIFORNIA

ID DESTINATION
R CSAKI
OTTECK ST.
FRANCISCO, CALIF.

LOCATION OF PROPERTY
MCCLELLAN FIELD
SACRAMENTO, CALIFORNIA
CUST: MAJOR J. E. QUASNOSKY

ITEM DESCRIPTION

NO. OF LINE NO.	CLASSIFICATION (3)	COND. ITION (4)	UNIT OF MEASURE (5)	NO. OF UNITS PURCHASED (6)	FRACTIONS	UNIT PRICE (7)	AMOUNT (8)	NO. OF UNITS DELIVERED (9)	FRACTIONS	TOTAL REPORTED UNIT PRICE ITEM (10)
, CHEVROLET 1942, AERIAL E5 GUNNERY TRAINER, 1½ TON, 4x4, W.B.145", W/O WINCH, MODEL G7013, SER. #9NE22- ENGINE #BV 488492 4254										
01	45-1499 02	EA	1			1,125.96				2800.00

WAR ASSETS ADMINISTRATION
PAID
JUL - 9 1946
PER
CASHIER
REGIONAL OFFICE

TOTALS	1	$ 1,125.96	$ 2800.00

J. L. LEWIS
SIGNATURE OF ISSUING OFFICER

MARKETING SPECIALIST
TITLE OF ISSUING OFFICER

STANDARD REGISTER CO., DAYTON 1, OHIO, U. S. A.

"VETERANS PREFERENCE"

The contracting officer whose signature appears below certified that this contract is awarded to a veteran exercising preference rights in accordance with Surplus Property Administration Regulation 1. The purchaser agrees to buy the property listed herein in accordance with the attached sales conditions and any modifications thereof which are attached to and made a part hereof.

Buyer

Address

By

Title

ACCEPTANCE BY GOVERNMENT

By

Title Contracting Officer

U. S. DIST. CT. N. D. CAL.
No. 30881
U.S. EX. No. 2
JUL 30 1947
FILED
C. W. CALBREATH, Clerk
BY
DEPUTY CLERK

FIXED PRICE SALE

THE CONTRACTING OFFICER WHOSE SIGNATURE APPEARS BELOW CERTIFIES THAT THE CONTRACT WAS AWARDED AFTER PUBLIC NOTICE AT A FIXED PRICE IN ACCORDANCE WITH SALES PROCEDURE

CONTRACTING OFFICER

5 - TO PURCHASER - SURRENDER TO PROPERTY CUSTODIAN

WAR ASSETS ADMINISTRATION

/RECONSTRUCTION FINANCE CORPORATION/

CONSUMER GOODS DIVISION

DISPOSAL DOCUMENT NO. 10 — 147895

DATE: Nov. 8, 194

OFFICE: SAN FRANCISCO

WAR ASSETS ADMINISTRATION
REGIONAL OFFICE
30 VAN NESS AVENUE
SAN FRANCISCO 2, CALIFORNIA

617   81008-19-8-7

SHEET NO. 1 OF 1 SHEETS

AGENCY	LOCATION	FILE NO.	OWNING AGENCY DOCUMENT NO.	CONTRACT NO.	PURCHASE AUTHORITY NO.	BILL OF LADING NO.
2131	30	25396		617		

DISPOSAL CODE	TRANS. CODE	SALE NO.	ENCUMBRANCE NO.
31		45370	

	DECLARING AGENCY
710-A-25595 AR CSAKI ROTTECK ST. FRANCISCO, CALIF.	AAF 1068 - SATSC McCLELLAN FIELD SACRAMENTO, CALIFORNIA

AND DESTINATION	LOCATION OF PROPERTY
AR CSAKI ROTTECK ST. FRANCISCO, CALIF.	McCLELLAN FIELD SACRAMENTO, CALIFORNIA CUST: MAJOR J. E. QUASHONKY

ITEM DESCRIPTION

LINE NO. OR ITEM NO. (1)	CLASSIFICATION (3)	(4)	UNIT OF MEASURE (5)	NO. OF UNITS PURCHASED (6)	FRAC. TIONS	UNIT PRICE (7)	AMOUNT (8)	NO. OF UNITS DELIVERED (9)	FRAC. TIONS
K, CHEVROLET 1942, AERIAL 25 GUNNERY TRAINER, 1½ TON, 4x4, W.B.145", W/O WINCH, MODEL G7013, SER. [illegible]									
-91 [illegible]			EA	1			1,125.96	1	

COMPLETED
[illegible]
WAA - 30 Van Ness Ave.
San Francisco, Calif.
By: E. Cocker
Date: 7-19-46

WAR ASSETS ADMINISTRATION
PAID
JUL - 9 1946
PER HS
CASHIER
REGIONAL OFFICE

TOTALS 1 $ 1,125.96

E. J. Loran
E. L. LOGAN
SIGNATURE OF ISSUING OFFICER

MARKETING SPECIALIST
TITLE OF ISSUING OFFICER

STANDARD REGISTER CO., DAYTON 1, OHIO, U. S. A.

NOTICE:
Upon presentation of this copy, the property custodian is to release the above surplus property to the above-named buyer or his authorized representative. This copy should be signed by both buyer and custodian and returned to the issuing Office shown above.

I acknowledge receipt of the material listed in this document in the quantities shown in the column titled "No. of Units Delivered".

Oscar Csaki
BUYER'S SIGNATURE

Delivered in accordance ...
Jasper St. John
CUSTODIAN'S SIGNATURE
JASPER D. ST.JOHN, Major, Air Cor

FORM WAA-SF-17

WAR ASSETS ADMINISTRATION

11841

S-35617

CONT. NO. 28617

SALE NO. [illegible]

KNOW ALL MEN BY THESE PRESENTS:

BILL OF SALE

THAT IN CONSIDERATION ONE THOUSAND ONE HUNDRED TWENTY-FIVE & 96/100 DOLLARS ($ 1,125.96) AND OTHER VALUABLE CONSIDERATION, THE RECEIPT WHEREOF IS HEREBY ACKNOWLEDGED, THE UNDERSIGNED (SELLER) DOES HEREBY SELL, TRANSFER AND DELIVER UNTO OSCAR CRAKI (BUYER) HIS RIGHT, TITLE AND INTEREST IN AND TO THE FOLLOWING DESCRIBED VEHICLE:

26396 MAKE CHEVROLET ENGINE NO. [illegible] SERIAL NO. [illegible]

TAG 81 BODY TYPE AERIAL E5 YEAR MANUFACTURED 1942 MODEL NO. [illegible]
GUNNERY TRAINER

THE SAID SELLER HEREBY WARRANTS THAT HE IS THE LAWFUL OWNER OF SAID VEHICLE; THAT IT IS FREE FROM ALL LIENS AND INCUMBRANCES EXCEPT LIEN ~~-~~ IN FAVOR OF "NO EXCEPTIONS" (~~OR NO SUCH LIEN~~, WRITE THE WORDS "NO EXCEPTIONS" IN THE BLANK SPACE)

THAT HE HAS THE RIGHT TO SELL THE SAME AS AFORESAID, AND THAT HE WILL WARRANT AND DEFEND THE TITLE OF SAME AGAINST THE CLAIMS AND DEMANDS OF ALL PERSONS WHOMSOEVER EXCEPT LIENHOLDER NAMED ABOVE.

SIGNED THIS DAY JULY 8, 1946

SELLER: WAR ASSETS ADMINISTRATION
30 VAN NESS AVENUE, SAN FRANCISCO, 2, CALIFORNIA

BY: [signature]

SIGNATURE OF SUBSCRIBING OFFICER: CHIEF MARKETING SPECIALIST

[signature]

U. S. DIST. CT. N. D. CAL.
No. 30881
U S EX. No.
FILED JUL 30 1947
C. W. CALBREATH, CLERK
BY [signature]
DEPUTY CLERK

orm No. WAA-SF-29 War Assets Administration, S.F.

MAIL ORDER REQUEST FOR SURPLUS PROPERTY

7/27/46 (This Form Must Be Made Out In Triplicate) 10-A-25255

O: Chief, Veterans Preference Unit
War Assets Administration
1540 Market Street
San Francisco 2, California

7/27/46 1946
(Date)

If available, I desire to purchase Lot nine (indicate number) of the items listed below in order of my preference, and offered in Sale Number S-35747
hose Sale Date is July 27 1946.

Choice Sequence	WAA Decl. No. (CRO File No.)	Item No.	Tag No.	Page No.	Price	Items Awarded
1.	16300	1 to 30 incl.			$3629.00	
2.	But not item # 9					
3.						
4.	16300	(2)	614	1	3629.00	✓
5.	16300	(5)	617	1	3629.00	✓
6.	16301	(24)	540	2	3629.00	✓
7.						
8.						
9.						
10.						

DO NOT WRITE IN THIS SPACE

Attached is my original Veteran's Preference Certificate, Case No. 25255, for items desired.

I hereby certify that I have personally inspected the aforementioned items, as listed, and understand that all purchases are on an "AS IS" and "WHERE IS" basis, without recourse. I am prepared to make payment upon notification of award and request for payment.

Oscar Cook
(Signature of Veteran)

ENCLOSURE

S- 35747
C- 28747

OSCAR COOK ← PLEASE PRINT OR TYPE YOUR NAME AND MAILING ADDRESS IN THE LOWER LEFT HAND CORNER OF THIS FORM.

et 75 Sotter St.

& State S.F. Calif.

Name of Company	Case Number	Code Classification
OSCAR CSAKI	10-A-25255	45-1406

Number and Street	City	State	Month	Day	Year
75 Rottack St	San Francisco 12	Calif	3	27	46

Official to Contact	Phone No.	Search Expiration Date:
	FI. 2460	

Applicant's Business is:	Applicant is:				
Hauling & Trucking		Retailer ☐	Manufacturer ☐	Wholesaler ☐	Other ☐

Quantity	Unit of Measure	Description:	Thickness or Gage	Width and Length
three	each	Van Trucks 1½ or 2½ or 3 or 4ton		

CERTIFICATION FOR VETERAN'S PREFERENCE

DATE 3-27-46

WAR ASSETS CORPORATION

Remarks:

WAC-63
5-7-45

Surplus Consumer Goods or Materials Inquiry Card

Budget Bureau No.
22-R-2563
Form Approved

P-1016-D

Form WAA-SF-22 (formerly tel...) War Assets Administration, S.F.

11841

MEMORANDUM Date July 13 1946

TO: J. L. Lewis, Chief Automotive Section II
30 Van Ness Ave.,

U. S. DIST. CT. N. D. CAL.
No. 31551 Civil
U. S. EX. No. 1
FILED JUL 30 1947
C. W. CALBREATH, Clerk
Edward A. Tolhurst
Deputy Clerk

FROM: W. A. Weertendyke
Veterans Preference Unit
1540 Market Street, S.F. Loc: Rm 22

SUBJECT: SALES CONTRACT FOR VETERAN ~~OSCAR OSAKI~~ (Name)
SWPC CASE NO. 10-A-25255

75 Rotteck St.
San Francisco, California

1. This veteran desires to purchase the following:

Two (2) Truck, Van 6 Ton, 6x6 Drive. Cre File #. 16300
Tag 614 Item 2 Price. $3629.00 Location: Signal Corps Depot
Tag 617 Item 5 Price. $3629.00 Sacramento, California

47 Ons (1) Truck Van, 6 Ton, 6x6 Drive.
47 Cre File No. 16301
Tag 540
Item 24
Price. $3629.00 Located at the New Signal Crops Depot, Sacramento, California

2. Please prepare sales contract form 1192 at once in order to permit this veteran to make payment by 2 p.m. _____, 1946.

3. This transaction will be completed: By mail ___ By office call ___

4. Shipping instructions:
Veteran will pick up this property at site at own expense.

5. Veterans Preference Certificate is (not) attached; all items listed thereon have (not) been completed.

6. Please acknowledge receipt of this request on the attached copy provided for your convenience and return to Veterans Pref rence Unit.

RECEIPT ACKNOWLEDGED BY:

_____ _____ _____, 1946
Signature Title Date

WA Weertendyke:dm
Distribution: Original & copy to addressee
1 copy - dictator's reading file
1 copy - division master file
1 copy - division reading file

1 - SALES FILE COPY

//RECONSTRUCTION/FINANCE/CORPORATION//

WAR ASSETS ADMINISTRATION

DISPOSAL DOCUMENT NO. 10 — 307848

DATE: July 17, 1946

SHEET NO. 1 OF 81 SHEETS

CE

ISCO

7 04-170-SC-5563C

AGENCY	LOCATION	FILE NO	OWNING AGENCY DOCUMENT NO.	CONTRACT NO	PURCHASE AUTHORITY NO.	BILL OF LADING NO.	
2123	322	16301		28747			SEC-2

	BALANCE DUE	DATE BALANCE DUE	DISPOSAL CODE	TRANS. CODE	SALE NO.	ENCUMBRANCE NO.
			31		45468	

#10-A-25255
CSAKI
TTECK ST.
RANCISCO, CALIF.

DECLARING AGENCY
SACRAMENTO SIGNAL DEPOT
NORTH SEVENTH ST
SACRAMENTO, CALIF. (15)

ND DESTINATION
CSAKI
TTECK ST.
RANCISCO, CALIF.

LOCATION OF PROPERTY
SACRAMENTO SIGNAL DEPOT
N. 7TH ST., SACRAMENTO, CALIF.
CUST: CAPT. R. A. HOWLAND

ITEM DESCRIPTION

ITEM NO. OR SCHEDULE ITEM NO	CLASSIFICATION	CONDITION	UNIT OF MEASURE	NO. OF UNITS PURCHASED	FRACTIONS	UNIT PRICE	AMOUNT	NO. OF UNITS DELIVERED	FRACTIONS	TOTAL REPORTED COST FOR ITEM
	(2)	(4)	(5)	(6)		(7)	(8)	(9)		(10)
	VAN, 1942, WHITE, TON 6, DRIVE, W.B.185", N/WINCH MODEL 666, SER#250526 ENG#[illegible] HXC-324938									
40										
01	45-1300	02	EA	1			3629.00			13647.00

TOTALS 1 $ 3629.00 $ 13647.00

J.L.Lewis
SIGNATURE OF ISSUING OFFICER

MARKETING SPECIALIST
TITLE OF ISSUING OFFICER

STANDARD REGISTER CO., DAYTON 1, OHIO, U. S. A.

3

VETERANS PREFERENCE

The contracting officer whose signature appears below certified that this contract is awarded to a veteran exercising preference rights in accordance with Surplus Property Administration Regulation 7. The purchaser agrees to buy the property listed herein in accordance with the attached sales conditions and any modifications thereof which are attached to and made a part hereof.

Oscar Cook 75 Rotteck St. SF

Buyer Address

By _____ Title

ACCEPTANCE BY GOVERNMENT

By _____ Title Contracting Officer

FIXED PRICE SALE

THE CONTRACTING OFFICER WHOSE SIGNATURE APPEARS BELOW CERTIFIES THAT THE CONTRACT WAS AWARDED AFTER PUBLIC NOTICE AT A FIXED PRICE ADMINISTRATIVELY PREDETERMINED IN ACCORDANCE WITH SALES PROGRAM NO. _____

(CONTRACTING OFFICER)

TITLE _____

SALES FILE COPY

WAR ASSETS ADMINISTRATION

~~RECONSTRUCTION FINANCE CORPORATION~~

XXXXXXXXXXXXXXXXXXXXXXXXX

OFFICE: [illegible] FRANCISCO

35747 04-170-SC-5589C

DISPOSAL DOCUMENT NO. 10 — 307893

DATE: July 17, 1946

SHEET NO. 1 OF 1 SHEETS

[illegible]	AGENCY	LOCATION	FILE NO.	OWNING AGENCY DOCUMENT NO.	CONTRACT NO.	PURCHASE AUTHORITY NO.	BILL OF LADING NO.	
[illegible]	2123	322	16300		28747			SEC. 2

DEPOSIT	BALANCE DUE	DATE BALANCE DUE	DISPOSAL CODE	TRANS. CODE	SALE NO.	ENCUMBRANCE NO.
			31		45468	

[illegible]E #10-A-25255
[illegible]AR CSAKI
[illegible]ROTTECK ST.
[illegible] FRANCISCO, CALIF.

DECLARING AGENCY
SACRAMENTO SIGNAL DEPOT
NORTH SEVENTH STREET
SACRAMENTO 15, CALIFORNIA

[illegible]E AND DESTINATION
[illegible]AR CSAKI
[illegible]ROTTECK ST.
[illegible] FRANCISCO, CALIF.

LOCATION OF PROPERTY
NEW SIGNAL CORPS DEPOT
SACRAMENTO, CALIFORNIA
CUST: CAPT. R. A. HOWLAND

ITEM DESCRIPTION

LINE NO. OR ITEM NO. (2)	CLASSIFICATION (3)	CONDITION (4)	UNIT OF MEASURE (5)	NO. OF UNITS PURCHASED (6)	FRACTIONS	UNIT PRICE (7)	AMOUNT (8)	NO. OF UNITS DELIVERED (9)	FRACTIONS	TOTAL REPORTED COST PER ITEM (10)
[illegible]CK, WHITE 1942, K 56 B VAN, 6 TON, DRIVE 6X6, W/O WINCH, .185", MODEL 666, SERIAL #251062, ENGINE #HXC-326143										
-01	45-1300	02	EA	1			3629.00			136[illegible]7.00

TOTALS 1 → $ 3629.00 $ [illegible] 136[illegible]7.00

WAR ASSETS ADMINISTRATION
PAID
JUL [illegible] 1946
CASHIER
REGIONAL OFFICE

J. L. Lewis
J. L. Lewis
SIGNATURE OF ISSUING OFFICER

MARKETING SPECIALIST
TITLE OF ISSUING OFFICER

STANDARD REGISTER CO., DAYTON 1, OHIO, U. S. A.

"VETERANS PREFERENCE"

The contracting officer whose signature appears below certifies that this contract is awarded to a veteran exercising preference rights in accordance with Surplus Property Administration Regulation 7. The purchaser agrees to buy the property listed herein in accordance with the attached sales conditions and any modifications thereof which are attached to and made a part hereof.

Oscar Cook 75 Rotteck St SF.

Buyer Address

By

ACCEPTANCE BY GOVERNMENT

Title

By Title Contracting Officer

FIXED PRICE SALE

THE CONTRACTING OFFICER WHOSE SIGNATURE APPEARS BELOW CERTIFIES THAT THE CONTRACT WAS AWARDED AFTER PUBLIC NOTICE AT A FIXED PRICE ADMINISTRATIVELY PREDETERMINED IN ACCORDANCE WITH SALES PROGRAM NO.

BY

(CONTRACTING OFFICER)

TITLE

WAR ASSETS ADMINISTRATION

RECONSTRUCTION FINANCE CORPORATION

DISPOSAL DOCUMENT NO. 10 — 306500

DATE: July 17, 1946

SHEET NO. 1 OF 1 SHEETS

FICE: FRANCISCO

5747

04-170-SC-5589C

AGENCY	LOCATION	FILE NO	OWNING AGENCY DOCUMENT NO.	CONTRACT NO.	PURCHASE AUTHORITY NO.	BILL OF LADING NO.	
2123	322	16300		28747			SEC. 2

SIT	BALANCE DUE	DATE BALANCE DUE	DISPOSAL CODE	TRANS. CODE	SALE NO.	ENCUMBRANCE NO.
			81		45468	

#10-A-25255
R. CSAKI
OTTECK ST.
FRANCISCO, CALIF.

DECLARING AGENCY
SACRAMENTO SIGNAL DEPOT
NORTH SEVENTH STREET
SACRAMENTO 15, CALIFORNIA

AND DESTINATION
R CSAKI
OTTECK ST.
FRANCISCO, CALIF.

LOCATION OF PROPERTY
NEW SIGNAL CORPS DEPOT
SACRAMENTO, CALIFORNIA
CUST: CAPT. R. A. HOWLAND

ITEM DESCRIPTION

NO. OR ITEM NO. (2)	CLASSIFICATION (3)	CONDITION (4)	UNIT OF MEASURE (5)	NO. OF UNITS PURCHASED (6)	FRACTIONS	UNIT PRICE (7)	AMOUNT (8)	NO. OF UNITS DELIVERED (9)	FRACTIONS	TOTAL REPORTED COST PER ITEM (10)
K, WHITE 1942, K-VAN, 6 TON, DRIVE 6X6, W/O WINCH, W.B. , MODEL 666, SERIAL #251197, ENGINE #HXC 326565										
01 45-1300	R2	EA	1			3629.00				13647.00

WAR ASSETS ADMINISTRATION
PAID
JUL 24 1947
REGIONAL OFFICE

TOTALS 1 $ 3629.00 $ 13647.00

J. L. Lewis
SIGNATURE OF ISSUING OFFICER

MARKETING SPECIALIST
TITLE OF ISSUING OFFICER

U. S. DIST. CT. N. D. CAL.
No. 30881
U. S. EX. No. 5
FILED JUL 30 1947
C. W. CALBREATH, Clerk
BY Edward J. Tolbert
DEPUTY CLERK

11841

STANDARD REGISTER CO., DAYTON 1, OHIO, U. S. A.

"VETERANS PREFERENCE"

The contracting officer whose signature appears below certified that this contract is awarding a veteran exercising preference rights in accordance with Surplus Property Administration Regulation 7. The purchaser agrees to buy the property listed herein in accordance with the attached sales conditions and any modifications thereof which are attached to and made a part hereof.

Oscar Csaki 75 Rotteck St S ff

Buyer Address

By _____ Title _____

ACCEPTANCE BY GOVERNMENT

By _____ Title Contracting Officer

FIXED PRICE SALE

THE CONTRACTING OFFICER WHOSE SIGNATURE APPEARS BELOW CERTIFIES THAT THE CONTRACT WAS AWARDED AFTER PUBLIC NOTICE AT A FIXED PRICE ADMINISTRATIVELY PREDETERMINED IN ACCORDANCE WITH SALES PROGRAM NO. 1

BY _____ (CONTRACTING OFFICER)

TITLE _____

5 - TO PURCHASER - SURRENDER TO PROPERTY CUSTODIAN

WAR ASSETS ADMINISTRATION

ALLOCATION/TRANSFER/DISPOSITION

DISPOSAL DOCUMENT NO. 10 — 306500

DATE: July 19, 19

SHEET NO. 1 OF 1 SHEETS

OFFICE: SAN FRANCISCO 80 VAN NESS AVENUE SAN FRANCISCO 2, CALIFORNIA

-35747 04-170-SC-7595C

AGENCY	LOCATION	FILE NO.	ISSUING AGENCY DOCUMENT NO.	CONTRACT NO.	PURCHASE AUTHORITY NO.	BILL OF LADING NO.
2123	322	16300				

DISPOSAL AGENCY CODE | FED. AGENCY CODE | SALE NO. | ENCUMBRANCE NO.

#10-A-35285
AR OSAKI
ROTTECK ST.
FRANCISCO, CALIF.
E AND DESTINATION

AR OSAKI
ROTTECK ST.
FRANCISCO, CALIF.

CLAIMING AGENCY
SACRAMENTO SIGNAL DEPOT
NORTH SEVENTH STREET
SACRAMENTO 14, CALIFORNIA

LOCATION OF PROPERTY
NEW SIGNAL SUPPLY DEPOT
SACRAMENTO, CALIFORNIA
CONT: CAPT. R. A. WORLAND

ITEM DESCRIPTION

LINE NO. OR ITEM NO.	CLASSIFICATION		UNIT OF MEASURE	NO. OF UNITS PURCHASED	FRACTIONS	UNIT PRICE	AMOUNT	NO. OF UNITS DELIVERED	FRACTIONS	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)		(10)
	CK, WHITE 1942, 6-VAN, 6 TON, DRIVE ONE, W/B WINCH, W.H. 5", MODEL 666, SERIAL 2931197, ENGINE SERIAL 3									
-01	37-1300		EA	1						

Received this
Truck
Date 7-19-46
WAA—30 Van Ness Ave.
San Francisco, Calif.

WAR ASSETS ADMINISTRATION
JUL 22 1946
REGIONAL OFFICE

TOTALS 1 $

SIGNATURE OF ISSUING OFFICER

TITLE OF ISSUING OFFICER

NOTICE:

Upon presentation of this copy, the property custodian is to release the above surplus property to the above-named buyer or his authorized representative. This copy should be signed by both buyer and custodian and returned to the Issuing Office shown above.

I acknowledge receipt of the material listed in this document in the quantities shown in the column titled "No. of Units Delivered".

Delivered in accordance with

STANDARD REGISTER CO., DAYTON 1, OHIO, U. S. A.

5 - TO PURCHASER - SURRENDER TO PROPERTY CUSTODIAN

~~RECONSTRUCTION FINANCE CORPORATION~~

~~OFFICE OF SURPLUS PROPERTY~~

WAR ASSETS ADMINISTRATION

REGIONAL OFFICE,
30 VAN NESS AVENUE
SAN FRANCISCO 2, CALIFORNIA

DISPOSAL DOCUMENT NO. 10 — 307848

DATE: July 17, 194[illegible]

SHEET NO. 1 OF [illegible] SHEETS

...ICE: ...ISCO

AGENCY	LOCATION	FILE NO.	[illegible]	CONTRACT NO.	PURCHASE AUTHORITY NO.	BILL OF LADING NO.
[illegible]				[illegible]747		

DISPOSAL CODE	TRANS. CODE	SALE NO.	ENCUMBRANCE NO.
[illegible]		[illegible]	

#10-A-[illegible]
[illegible] OSAKI
[illegible] ST.
[illegible] FRANCISCO, CALIF.

DECLARING AGENCY

[illegible] SIGNAL DEPOT
[illegible]

...AND DESTINATION

[illegible] OSAKI
[illegible] ST.
[illegible] FRANCISCO, CALIF.

LOCATION OF PROPERTY

[illegible]

ITEM DESCRIPTION

...NO. OR ITEM NO. (2)	CLASSIFICATION (3)	(4)	UNIT OF MEASURE (5)	NO. OF UNITS PURCHASED (6)	FRACTIONS	UNIT PRICE (7)	AMOUNT (8)	NO. OF UNITS DELIVERED (9)	FRACTIONS	(10)
[illegible] VAN, 194[illegible], WHITE, [illegible] [illegible]										
[illegible]			EA	1			[illegible].00			

COMP[illegible]
[illegible]
WAA—30 Van Ness Ave.
San Francisco, Calif.
By: [signature]
Date: 9/26/46

WAR ASSETS ADMINISTRATION
PAID
JUL 24 1946
CASHIER
REGIONAL OFFICE

TOTALS 1 $ [illegible]

SIGNATURE OF ISSUING OFFICER [signature]

[illegible]

NOTICE:
Upon presentation of this copy, the property custodian is to release the above surplus property to the above-named buyer or his authorized representative. This copy should be signed by both buyer and custodian and returned to the issuing Office shown above.

I acknowledge receipt of the material listed in this document in the quantities shown in the column titled "No. of Units Delivered".

[signature] Osaki

BUYER'S SIGNATURE

Delivered in accordance with instructions above.

[signature]

CUSTODIAN'S SIGNATURE

STANDARD REGISTER CO., DAYTON 1, OHIO, U. S. A.

5 - TO PURCHASER - SURRENDER TO PROPERTY CUSTODIAN

WAR ASSETS ADMINISTRATION

/RECONSTRUCTION/FINANCE/CORPORATION

DISPOSAL DOCUMENT NO. 10 – 307893

DATE:

SHEET NO. 1 OF _____ SHEETS

FRANCISCO

REGIONAL OFFICE,

50 VAN NESS AVENUE

SAN FRANCISCO, CALIFORNIA

5747

AGENCY	LOCATION	SALE NO.	CONSIGNEE AGENCY DOCUMENT NO.	CONTRACT NO.	PURCHASE AUTHORITY NO.	BILL OF LADING NO.
215	922	16300				

DISPOSAL CODE	FINANCE CODE	SALE NO.	ENCUMBRANCE NO.

/10-A-25256

CSAKI

TUCK ST.

CSAKI

TUCK ST.

DECLARING AGENCY

SACRAMENTO SIGNAL DEPOT

NORTH SEVENTH STREET

SACRAMENTO 14, CALIFORNIA

LOCATION OF PROPERTY

NEW SIGNAL SUPPLY DEPOT

SACRAMENTO, CALIFORNIA

CUSTODIAN: CAPT. R. A. HOAGLAND

ITEM NO. ON CONSIGNEE NO.	CLASSIFICATION		UNIT OF MEASURE	NO. OF UNITS PURCHASED	FRACTIONS	UNIT PRICE	AMOUNT	NO. OF UNITS DELIVERED	FRACTIONS
(1)	(3)	(4)	(5)	(6)		(7)	(8)	(9)	
	TRUCK, WHITE 1945, X 2½ U VAN, 6 TON, DRIVE ONE WA WINCH, 18", MODEL 666, SERIAL [illegible], ENGINE [illegible]		EA	1					

COMPLETED

WAA-50 Va. Hosp.

By:

Date: 9/25/46

WAR ASSETS ADMINISTRATION PAID JUL 24 1946 PER CASHIER REGIONAL OFFICE

TOTALS 1

NOTICE:

Upon presentation of this copy, the property custodian is to release the above surplus property to the above-named buyer or his authorized representative. This copy should be signed by both buyer and custodian and returned to the issuing Office shown above.

I acknowledge receipt of the material listed in this document in the quantities shown in the column titled "No. of Units Delivered".

SIGNATURE OF ISSUING OFFICER

Delivered in accordance with

STANDARD REGISTER CO., DAYTON 1, OHIO, U. S. A.

WAR DEPT. SHIPPING DOCUMENT

DATE SHIPPED: 7-30-46

CAR NO. & INITIAL:

SEAL NOS.

B/L NO.

CARRIER

VOUCHER NO.	STATION	REQUISITION NO.	MO.	DAY	YR	SHEET
118220	04-179	8401-47	7	29	6	1

FROM: SACRAMENTO SIGNAL DEPOT
SACRAMENTO CALIFORNIA

TO: OSCAR OSAKI
75 NOTTECK ST.,
SAN FRANCISCO, CALIFORNIA
M/F: WAR SURPLUS
DISP DOC NO 307848

83R

RECAPITULATION OF SHIPMENT

TOTAL PCGS.	TYPE PCGS.	DESCRIPTION	TOTAL WEIGHT	TOTAL CUBE
TOTAL			24000	2000

Pristine Property

PROCURED BY C.O.D.

VOUCHER NO.

VOUCHER DATE

TALLY

STOCK NUMBER	7-26-46	DESCRIPTION OF ARTICLES	UNIT OF MEAS	NO. OF PKGS.	TYPE OF PKGS.	PKG NUMBER	UNIT WT.	TOTAL WEIGHT	UNIT CUBE	TOTAL CUBE	ITEM NO.	STOCK (ONLY)	FULLY QUANTITY ACTUALLY SHIPPED
SURP PROP TO BE FWDED TO DISP AGENCY AUTH WAA DISP DOC NO 307848 SP8-1 04-170-SC-55630													
REQ 3 ORDER CYS AND 3 FINAL CYS WOULD BE FWDED TO POD. DO NOT SHIP. CONSIGNEE WILL PICK UP.													
SHOULD BE ADV FOR DELIVERY WITHIN 48 HOURS.													
1.	6V1056	TRUCK, VAN, 1942, WHITE,	EA	1	TRUCK	1	24000	2000	1	97			
		TON 6, DRI 6X6, W.B. 185",											***
		W/WINCH, MODEL 666, SER NO				RECD 7-30-46							
		250526, TAG NO 540, USA NO				OSCAR OSAKI BY JACK CHRISTALL							
		6021115, LINE NO 2449.											

QUANTITY RECEIVED

DATE RECEIVED

SIGNATURE OF CONSIGNEE

DATE INSPECTED

INSPECTOR'S STAMP

11841

WAA-SF-17

WAR ASSETS ADMINISTRATION

S-35747

CONT. No. 28747

SALE No. 45468

KNOW ALL MEN BY THESE PRESENTS,

BILL OF SALE

That in consideration of Three Thousand Six Hundred Twenty Nine 00/100 DOLLARS ($3629.00)

AND OTHER VALUABLE CONSIDERATION, THE RECEIPT WHEREOF IS HEREBY ACKNOWLEDGED, THE UNDERSIGNED (SELLER) DOES HEREBY SELL, TRANSFER AND DELIVER UNTO OSCAR CRAIG (BUYER) HIS RIGHT, TITLE AND INTEREST IN AND TO THE FOLLOWING DESCRIBED VEHICLE:

16300 MAKE WHITE ENGINE No. MXC 326565 SERIAL No. 251197

TAG 614 BODY TYPE VAN YEAR MANUFACTURED 1942 MODEL No. 666

THE SAID SELLER HEREBY WARRANTS THAT HE IS THE LAWFUL OWNER OF SAID VEHICLE; THAT IT IS FREE FROM ALL LIENS AND ENCUMBRANCES EXCEPT LIEN ~~-~~ IN FAVOR OF "NO EXCEPTIONS" (OR IF NO LIENS EXIST, WRITE THE WORD "NO EXCEPTIONS" ON THE BLANK SPACE)

THAT HE HAS THE RIGHT TO SELL THE SAME AS AFORESAID, AND THAT HE WILL WARRANT AND DEFEND THE TITLE OF SAME AGAINST THE CLAIMS AND DEMANDS OF ALL PERSONS WHOMSOEVER EXCEPT LIENHOLDER NOTED ABOVE.

SIGNED THIS DAY July 17, 46

SELLER: WAR ASSETS ADMINISTRATION
30 VAN NESS AVENUE, SAN FRANCISCO, 2, CALIFORNIA

BY: [signature]
CHIEF MARKETING SPECIALIST

Signature of subscribing witness:

[signature]

U. S. DIST. CT. N. D. CAL.
No. 30881
U.S. EX. No. 10
FILED JUL 30 1947
C. W. CALBREATH, Clerk
BY [signature]
DEPUTY CLERK

AM WAA-SF-17

WAR ASSETS ADMINISTRATION

S-35747

CONT. No. 28747

SALE NO. 45468

KNOW ALL MEN BY THESE PRESENTS:

BILL OF SALE

THAT IN CONSIDERATION Three Thousand Six Hundred Twenty Nine & 00/100 DOLLARS ($3629.00)

AND OTHER VALUABLE CONSIDERATION THE RECEIPT WHEREOF IS HEREBY ACKNOWLEDGED, THE UNDERSIGNED (SELLER) DOES HEREBY SELL, TRANSFER AND DELIVER UNTO OSCAR OSAKI (BUYER) HIS RIGHT, TITLE AND INTEREST IN AND TO THE FOLLOWING DESCRIBED VEHICLE:

16300 MAKE WHITE ENGINE No. HXC-326143 SERIAL No. 251062

TAG 617 BODY TYPE VAN YEAR MANUFACTURED 1942 MODEL No. 666

THE SAID SELLER HEREBY WARRANTS THAT HE IS THE LAWFUL OWNER OF SAID VEHICLE; THAT IT IS FREE FROM ALL LIENS AND INCUMBRANCES EXCEPT LIEN IN FAVOR OF "No Exceptions" (IF NO LIENS EXIST, WRITE THE WORDS "No Exceptions" IN THE BLANK SPACE) THAT HE HAS THE RIGHT TO SELL THE SAME AS AFORESAID, AND THAT HE WILL WARRANT AND DEFEND THE TITLE OF SAME AGAINST THE CLAIMS AND DEMANDS OF ALL PERSONS WHOMSOEVER EXCEPT LIENHOLDER NOTED ABOVE.

SIGNED THIS DAY July 17, 46

SELLER: WAR ASSETS ADMINISTRATION
30 Van Ness Ave., San Francisco, 2, California

BY: J.L.Lewis
CHIEF MARKETING SPECIALIST

SIGNATURE OF SUBSCRIBING WITNESS:

_____

2740

Form WAA-OF-17

WAR ASSETS ADMINISTRATION

S-35747
CONT. NO.
SALE NO.

KNOW ALL MEN BY THESE PRESENTS:

BILL OF SALE

Three Thousand Six Hundred Twenty Nine

THAT IN CONSIDERATION OF $3629.00 AND OTHER VALUABLE CONSIDERATION, THE RECEIPT WHEREOF IS HEREBY ACKNOWLEDGED, THE UNDERSIGNED (SELLER) DOES HEREBY SELL, TRANSFER AND DELIVER UNTO [redacted] (BUYER) HIS RIGHT, TITLE AND INTEREST IN AND TO THE FOLLOWING MOTOR VEHICLE:

6301
AG 540

MAKE WHITE ENGINE NO. HXC 32990 SERIAL NO.

BODY TYPE 1/2 TON TRUCK YEAR MANUFACTURED 1942 MODEL NO. 666

THE SAID SELLER HEREBY WARRANTS THAT HE IS THE LAWFUL OWNER OF SAID VEHICLE; THAT IT IS FREE FROM ALL LIENS AND ENCUMBRANCES EXCEPT LIEN IN FAVOR OF THE GOVERNMENT (IF NO SECOND LIEN, INSERT THE WORD "NONE" FOLLOWING THE WORD GOVERNMENT AS THE CASE SHOULD BE);

THAT HE HAS THE RIGHT TO SELL THE SAME AS AFORESAID, AND THAT HE WILL WARRANT AND DEFEND THE TITLE OF SAME AGAINST THE CLAIMS AND DEMANDS OF ALL PERSONS WHOMSOEVER EXCEPT LIENHOLDER NOTED ABOVE.

SIGNED THIS DAY July 15, 19[illegible]

SELLER: WAR ASSETS ADMINISTRATION
39 VAN NESS AVENUE, SAN FRANCISCO, 2, CALIFORNIA

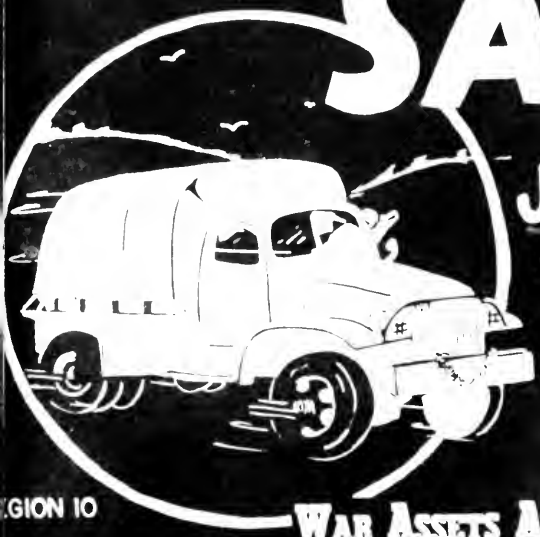
BY: [signature]
CHIEF MARKETING SPECIALIST

SIGNATURE OF SUBSCRIBING WITNESS:

[signature]

NORTHERN CALIFORNIA & NEVADA

Veterans' TRUCKS AND TRAILERS FOR SALE



JUNE 25-26

San Francisco:
MASONIC HALL, 25 VAN NESS

Reno:
131 WEST SECOND ST.

GION 10

WAR ASSETS ADMINISTRATION
REGIONAL OFFICE
30 VAN NESS AVE.
SAN FRANCISCO 2, CALIFORNIA

MR. BRIGGS

NORTHERN CALIFORNIA & NEVADA

BOLIN

TRUCKS

OVER 2 1/2 TON

AND

TRUCK-TRACTORS

FOR

SALE

BOLIN

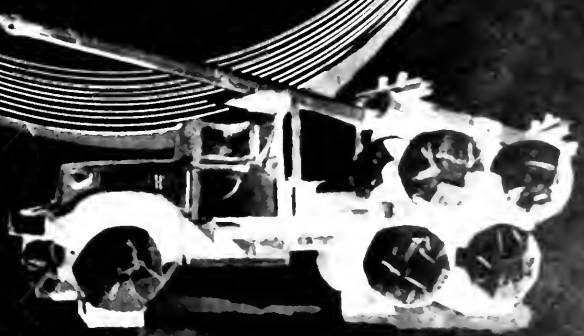
FEDERAL AGENCIES ..... JUNE 3-17

VETERANS WORLD WAR II ..... JUNE 24-JULY 12

SMALL BUSINESS (CERTIFIED BY R.F.C) .... JULY 22 TO AUGUST 2

STATE & LOCAL GOVTS ..... JULY 22-AUG. 6

NON-PROFIT INSTS .. JULY 22-AUGUST 7



CYCLE SALE NO. 20

WAR ASSETS ADMINISTRATION C-10-8-199

30 VAN NESS AVE.
SAN FRANCISCO 2, CALIFORNIA

Welcome Case #1

CONFIDENTIAL - For Use of Federal Agencies Only.

Form SWPC-66 (8-30-45) — United States of America, SMALLER WAR PLANTS CORPORATION

VETERAN'S APPLICATION FOR SURPLUS PROPERTY

(Under SPB Reg. 7)

Form Approved
Budget Bureau No. 12-R2868

DO NOT FILL IN THIS SPACE

Case No. W B 26151

Date 3-27-46

IMPORTANT - See Instructions on Separate Sheet

1. Applicant: Oscar (First Name) M. (Initial) Csaki (Last Name)

2. Mailing address: 75 Rotteck St (Street, RFD, or P.O. Box) — Telephone No. PIN 2460

San Francisco 12. S.f. (City and Zone) Calif. (County) California (State)

3. If other application has been filed on this form, SWPC-66, indicate place and date of filing.

4. Trade name of enterprise: Csaki Waste Materials

5. Address of enterprise: 75 Rotteck St (Street, RFD, or P. O. Box No.) S.f. 12. S.f. (City and Zone) Calif. (County) California (State)

6. (a) Type of enterprise (Check one)
Business [X] Professional [ ] Agricultural [ ]

(b) Legal form of enterprise (Check one)
Corporation [ ] Partnership [X] Individual Proprietorship [ ]

(c) Description of enterprise: Buying Waste materials Bags, Metals etc

7. Is the enterprise already established 1½ years? If "Yes", are you now operating it? Yes (Yes or No) How and when do you plan to start your operations if you are starting a new enterprise or buying into an existing enterprise?

8. Size of enterprise. Specify estimated number of wage earners ...

Present	Anticipated in 3 months
2	5.

9. What experience, training, and/or education have you had which you believe assures the success of this enterprise?

10. Description of items wanted.

Quantity (a)	Unit (b)	Description (List items in order of preference) (c)	Is inspection desired? (Yes or No for each item) (d)	Research organization code (e)
1	Ea	3/4 or 1½ ton truck rack side or C Std P or Flat bed 4 S/MC. Chev Dodge or Ford		
1	Ea	5 Pass sedan or 4 dr sedan Preferred Plymouth 1941 or 1942 model		
2	Ea	Standard typewriters Preferred Underwood Remington		

(Use extra sheets, if necessary, and attach to this application)

11. Will you desire the extension of credit by SWPC in the purchase of any of the items listed above? (yes or no)

If "Yes", please furnish the additional information requested in Items 12 through 17 following.

Form SWPC-66 (6-20-45)

IF SWPC CREDIT IS NOT DESIRED, DO NOT FILL IN ITEMS 12 THROUGH 17

12. Name and address of each bank with whom you are now a depositor.

(a)

(b)

13. Name and address of each bank to whom you are indebted.

(a)

(b)

14. Credit references (trade or charge accounts). *(Give names and addresses)*

(a)

(b)

15. Personal references. *(Give names and addresses)*

(a)

(b)

(c)

16. Name(s) of other person(s) with proprietary interest connected with this enterprise. *(Give name(s) and address(es) and percent of interest)*

17. Balance Sheet of Enterprise, as of _____ Date

Current Assets		**Current Liabilities**	
Cash	$	Accounts Payable	$
Accounts Receivable		Notes Payable	
Notes Receivable		Other Liabilities	
Inventory			
Other Assets		Total Current Liabilities	
Total Current Assets		**Other Liabilities**	
Fixed and Other Assets		Mortgage	
Land		Reserve for Depreciation	
Buildings			
Machinery and Equipment		Net Worth	
Other Assets			
TOTAL ASSETS		TOTAL LIABILITIES	

18. I hereby certify that all of the foregoing statements are true to the best of my knowledge and belief, that I served in the active military or naval services of the United States on, or after, September 16, 1940, and prior to the termination of the present war and was discharged or released therefrom under honorable conditions; that I am, or will be, directly or indirectly, the sole proprietor of the enterprise described herein, or, that no person or persons, other than veterans, have or will have any proprietary interests in the enterprise, singly or together, directly or indirectly, in excess of 50 percent of either the capital invested in the enterprise or of the gross profits or income thereof; that the capital invested in the enterprise does not, or will not, exceed $25,000 if an agricultural enterprise, or $50,000 if a business or professional enterprise, that I am not procuring the property listed in this application for the purpose of resale; and that said property is to be used in and as part of the enterprise described herein.

12-11-45 _____
Date Signature of Applicant

IT IS A CRIMINAL OFFENSE, AND A FELONY, TO MAKE A WILLFULLY FALSE STATEMENT OR CLAIM, DIRECTLY OR BY ANY DEVICE OR SCHEME, TO ANY GOVERNMENT AGENCY, AS TO ANY MATTER WITHIN ITS JURISDICTION. (Sec. 35A, U.S. Criminal Code). HEAVY CIVIL PENALTIES ARE ALSO PROVIDED FOR THE FRAUDULENT OBTAINING OF SURPLUS PROPERTY. (Surplus Property Act, Sec. 20).

ACTION TAKEN BY GOVERNMENT OFFICIALS *(Not for Applicant's Use)*

19. I certify that the following information appeared on the discharge papers or a certificate of satisfactory completion of active duty shown me by the applicant.

(a) Last service Army (b) Serial number 39 001 155

(c) Type of papers presented Sep. Brnch (d) Date of discharge or release 26 Oct 45.

Discharge or Release: *(Check one)* Under honorable conditions [X] Other [ ]

I also certify that to the best of my knowledge and judgement the property covered by this application _____ foster and render more secure the enterprise described herein, and that business or farming will or will not conditions and other economic and geographic factors affecting the locality within which the enterprise is established will or will not render the success thereof reasonably probable, and that the applicant is or is not eligible under SPB Reg. 7.

Remarks:	Remarks:
_____ Number of AAA Committee _____ Date	_____ SWPC District Manager _____ Date
_____ Street _____ City and Zone	_____ Signature of Officer
_____ County _____ State	

20. Action by Loan Agent

_____ SWPC Loan Agent _____ Date

21. I approve / disapprove this application for the acquisition of surplus property.

Remarks:

_____ SWPC District Manager _____ Date

War Assets Corporation — SUPPLEMENTIAL

CONFIDENTIAL - For Use of Federal Agencies Only.

Form Approved
Budget Bureau No. 12-R2868

DO NOT FILL IN THIS SPACE

Case No.

Date 2/2/46

VETFRAN'S APPLICATION FOR SURPLUS PROPERTY
(Under SPB Reg. 7)

IMPORTANT - See Instructions on Separate Sheet

1. Applicant
OSCAR (First Name) NMI (Initial) CSAKI (Last Name)

2. Mailing address
75 ROTTECK ST (Street, RFD, or P.O. Box) — Telephone No. EX 2460
SF (City and Zone) SF (County) 12 (Zone) CALIF. (State)

3. If other application has been filed on this form, SWPC-66, indicate place and date of filing
1355 MKT DEC. 1945

4. Trade name of enterprise
CSAKIdson Salvage Co

5. Address of enterprise
75 ROTTECK ST (Street, RFD, or P. O. Box No.) San Francisco (City and Zone) 12 (County) Calif (State)

6. (a) Type of enterprise (Check one)
Business ☑ Professional ☐ Agricultural ☐

(b) Legal form of enterprise (Check one)
Corporation ☐ Partnership ☐ Individual Proprietorship ☐

(c) Description of enterprise
PICKUP & DELIVERY OF SCRAP IRON TO DIFFERENT DISPOSAL YARDS. PICKUP OF MATTRESSES & PILLOWS FROM COMMERCIAL SHIPS FOR DISINFECTING PURPOSES - HANDLING ALL TYPES WASTE MATERIALS & PRODUCTS CLAIMED JUNK OR UNSERVICEABLE.

7. Is the enterprise already established? yes (NO) If "Yes", are you now operating it? yes or no
How and when do you plan to start your operations if you are starting a new enterprise or buying into an existing enterprise?

8. Size of enterprise. Specify estimated number of wage earners

Present	Anticipated in 3 months

9. What experience, training, and/or education have you had which you believe assures the success of this enterprise? FATHERS BUSINESS TO BE TAKEN IN AS PARTNER

10. Description of items wanted.

Quantity (a)	Unit (b)	Description (List items in order of preference) (c)	Is inspection desired? (Yes or No for each item) (d)	Search expiration date (e)
1	EA.	✓ JEEP 1/4 TON	45-1301	
10	EA.	TRAILERS 1/4 TON ✓	45-1100	
2	EA.	PICKUP TRUCK ½ OR ¾	45-1309	
2	EA.	DUMP TRUCK 1½ or 2½ or 3 to 10	45-1405	
3	EA.	VAN TRUCKS 1½ or 2½ ton 3 to 4 Ton	45 1300-30	
3	EA.	PANEL SURFACES or PANEL DELIVERY ½ TON or 1 TON	APR 2 1946 45 1300	

(Use extra sheets, if necessary, and attach to this application)

11. Will you desire the extension of credit by SWPC in the purchase of any of the items listed above? NO (yes or no)

If "Yes", please furnish the additional information requested in Items 12 through 17 following.

7-1946 16-49

Form SWPC-65 (6-20-45)

IF SWPC CREDIT IS NOT DESIRED, DO NOT FILL IN ITEMS 12 THROUGH 17

12. Name and address of each bank with whom you are now a depositor.

(a)

(b)

13. Name and address of each bank to whom you are indebted.

(a)

(b)

14. Credit references (trade or charge accounts). *(Give names and addresses)*

(a)

(b)

15. Personal references. *(Give names and addresses)*

(a)

(b)

(c)

16. Name(s) of other person(s) with proprietary interest connected with this enterprise. *(Give name(s) and address(es) and percent of interest)*

17. Balance Sheet of Enterprise, as of _____ Date

Current Assets		**Current Liabilities**	
Cash	$	Accounts Payable	$
Accounts Receivable		Notes Payable	
Notes Receivable		Other Liabilities	
Inventory			
Other Assets			
Total Current Assets		Total Current Liabilities	
Fixed and Other Assets		**Other Liabilities**	
Land		Mortgage	
Buildings		Reserve for Depreciation	
Machinery and Equipment			
Other Assets		Net Worth	
TOTAL ASSETS		TOTAL LIABILITIES	

18. I hereby certify that all of the foregoing statements are true to the best of my knowledge and belief, that I am not in the active military or naval services of the United States on, or after, September 16, 1940, and prior to the termination of the present war and was discharged or released therefrom under honorable conditions; that I am, or will be, directly or indirectly, the sole proprietor of the enterprise described herein, or, that no person or persons, other than veterans, have or will have any proprietary interest in the enterprise, singly or together, directly or indirectly, in excess of 50 percent of either the capital invested in the enterprise or of the gross profits or income thereof; that the capital invested in the enterprise does not, or will not, exceed $25,000 if an agricultural enterprise, or $10,000 if a business or professional enterprise, that I am not procuring the property listed in this application for the purpose of resale; and that said property is to be used in and as part of the enterprise described herein.

3/27/46
Date

Signature of Applicant

IT IS A CRIMINAL OFFENSE, AND A FELONY, TO MAKE A WILLFULLY FALSE STATEMENT OR CLAIM, DIRECTLY OR BY ANY TRICK OR SCHEME, TO ANY GOVERNMENT AGENCY, AS TO ANY MATTER WITHIN ITS JURISDICTION. (Sec. 35A, U.S. Criminal Code). HEAVY CIVIL PENALTIES ARE ALSO PROVIDED FOR THE FRAUDULENT OBTAINING OF SURPLUS PROPERTY. (Surplus Property Act, Sec. 20).

ACTION TAKEN BY GOVERNMENT OFFICIALS *(Not for Applicant's Use)*

19. I certify that the following information appeared on the discharge papers or a certificate of satisfactory completion of active duty shown on by the applicant.

(a) Last service _____ (b) Serial number 3900 1153

(c) Type of papers presented _____ (d) Date of discharge or release 3/6/45

Discharge or Release: *(Check one)* Under honorable conditions ☑ Other ☐

I also certify that to the best of my knowledge and judgement the property covered by this application will will not foster and render more secure the enterprise described herein, and that business or farming conditions and other economic and geographic factors affecting the locality within which the enterprise is established will will not render the success thereof reasonably probable, and that the applicant is is not eligible under SPB Reg. 7.

Remarks:	Remarks:
Number of AAA Committee / Date	SWPC District Manager / Date
Street / City and Zone	District office
County / State	

20. Action by Loan Agent

SWPC Loan Agent / Date

21. I approve ~~disapprove~~ this application for the acquisition of surplus property.

Remarks:

JOC
SWPC District Manager

3/27/46
Date

P-1000 Re-Print

2514
2515

No. 11,841

IN THE

United States Court of Appeals

For the Ninth Circuit

ED DEBON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING AND FOR STAY OF MANDATE IF IT BE DENIED.

CHAUNCEY TRAMUTOLO,
Alexander Building, San Francisco 4, California,
Attorney for Appellant and Petitioner.

PERRY WALSH PRINTING CO., SAN FRANCISCO

Table of Authorities Cited

No. 11,841

IN THE

United States Court of Appeals

For the Ninth Circuit

ED DEBON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING AND FOR STAY OF MANDATE IF IT BE DENIED.

To the Honorable William Denman, Chief Judge, and to the Honorable Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Ed DeBon, appellant, moves for a rehearing of his cause of appeal upon the following grounds and for the following reasons:

I.

In deciding to affirm the judgment of conviction of the Court below on the conspiracy count and one substantive count this Court necessarily but erroneously must have concluded the appellant had a hand in preparing or causing the veteran Csaki and his partner

Hildebrand to make and file with the WAA the "Veteran's Application for Surplus Property" (see Exh. 13 in appendix to appellee's brief) dated December 11, 1945, or the "Supplemental Veteran's Application for Surplus Property" (see Exh. 14 in appendix to appellee's brief) dated March 27, 1946. The record is conclusive that the appellant did not know either Csaki or Hildebrand at those times. He first met Hildebrand four months later on July 8, 1946 (R. 40, 53, 57, 138, 139, 145), and Csaki on July 24, 1946. (R. 127, 128, 142.) In consequence, neither that application nor the supplemental application has any relevancy to the issues involved in this appeal.

II.

The gravamen of the substantive charge is that the mail order requests contained false representations on their face or that they concealed a material fact. The representation or concealment could only have been in the failure of Csaki (or Hildebrand) to disclose on the fact of those two requests that they were purchasing the Chevrolet gunnery truck and the three White van trucks for resale purposes. However, nothing on the face of those request forms required any such disclosure. Further, the appellant had nothing to do with the preparation and filing of those forms and there is not an iota of evidence in the record showing that he had any knowledge the two veterans had mailed or filed them or that there was any legal requirement that they be made and filed.

This Court's opinion fails to recognize the fact that the appellant was entitled to rely and did rely upon the representations of Hildebrand that he (Hildebrand) and his partner were licensed veteran dealers. Those representations were true. Hildebrand was in such a veteran dealers partnership with Mr. Mee of Bakersfield. Hildebrand, however, did not disclose the name of his partner to the appellant except on the date of sale of the items to the appellant when it was disclosed that his partner's name was Csaki. In consequence, insofar as the appellant was concerned, Hildebrand and his partner were authorized to resell the items they purchased from the WAA and there was nothing to lead the appellant to believe otherwise. So far as the appellant could have ascertained Hildebrand and his partner Csaki were authorized as licensed veteran dealers to resell the Chevrolet gunnery truck and the three White van trucks to him. Inasmuch as Csaki was authorized to purchase the items under his own priorities he obtained good title thereto. Although, under his agreement with the WAA, he had covenanted not to resell those items, his breach of that agreement did not preclude him from passing good title to those items to the appellant. In consequence, it was impossible for the appellant to have joined with Csaki and Hildebrand in making and filing false applications and mail order requests or to have conspired with them so to do.

III.

The record reveals that the jury itself had reached the conclusion that Hildebrand was a veteran dealer dealing in Csaki's priorities and that the two of them sold the items to the appellant. Because the facts indisputably demonstrated that Hildebrand had held himself out to be a veteran dealer (in partnership with Mee who turned out to be Csaki) the jury was vitally concerned about being instructed on the point of law which would have cleared the minds of the jury on the point. The question of law the jury put to the trial judge for clarification was as follows:

> (R. 202) "The third question is, Can a dealer buy on a veteran's priority and sell to a non-veteran on a commission basis?"

That question was not answered and, in consequence, the jury was not instructed on that question of law. That question was vital to the case because Hildebrand had represented to the appellant that he (Hildebrand) was a partner in a licensed veteran dealership and, consequently, was authorized to resell the items. Therefore, the appellant was entitled to an instruction that under such circumstances the appellant was justified in relying on the representation and in buying the items. See *Bollenbach v. U. S.,* 326 U.S. 607, 612-614, and *M. Kraus & Bros. v. U. S.,* 327 U.S. 614, 617.

CONCLUSION.

Wherefore the appellant requests that his petition for rehearing of his appeal be granted and that, in the event it be denied, that the mandate of this Court be stayed pending the filing and docketing in the United States Supreme Court of his petition for a writ of certiorari directed to this Court in this cause and pending final decision thereon of said Court.

Dated, San Francisco, California,
May 18, 1949.

Respectfully submitted,
CHAUNCEY TRAMUTOLO,
Attorney for Appellant
and Petitioner.

CERTIFICATE OF COUNSEL

The within petition for a rehearing is well founded in point of law and fact and is not interposed for delay.

Dated, San Francisco, California,
May 18, 1949.

CHAUNCEY TRAMUTOLO,
Attorney for Appellant
and Petitioner.

No. 11,841

IN THE

United States Court of Appeals

For the Ninth Circuit

ED DEBON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR RECONSIDERATION OF HIS PETITION FOR A REHEARING.

CHAUNCEY TRAMUTOLO,
Alexander Building, San Francisco 4, California,
Attorney for Appellant and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Authorities Cited

No. 11,841

IN THE

United States Court of Appeals

For the Ninth Circuit

ED DEBON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR RECONSIDERATION OF HIS PETITION FOR A REHEARING.

To the Honorable William Denman, Presiding Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

The appellant's petition for a rehearing was denied by this Court for the reasons expressed in its Opinion (1) that the evidence was sufficient, if believed by the jury, to disclose that the appellant asked Hildebrand to file the mail order requests and (2) that there was no evidence that Hildebrand was introduced to the appellant as a veteran dealer.

I.

There is no evidence in the record, direct or inferential, showing that the appellant asked Hilde-

brand to file any mail order requests and there is none that DeBon had any knowledge that mail order requests were required to be filed.

II.

The evidence shows that Hildebrand was introduced to the appellant as a veteran dealer—that Hildebrand actually had been in partnership with a Mr. Mee of Bakersfield in the automobile business who was duly licensed as such a dealer.

The appellant DeBon testified that Hildebrand was introduced to him as a "veteran dealer". See R. 142, reading as follows:

> "Q. How did you happen to buy them from Mr. Hildebrand?
>
> A. He was introduced to me as a dealer.
>
> Q. He was introduced to you as a dealer, as one having a dealer's license?
>
> A. Yes."

At R. 87 Hildebrand, a Government witness, testified that he (Hildebrand) was in the motor business with Mr. Mee of Bakersfield and that they were certified to the WAA as a veteran dealer. That testimony reads as follows:

> "Q. Just one more question: In your dealings with the Mee Company, were you certified to the War Assets Administration as what is known as a veteran dealer?
>
> A. Yes, we were."

And at R. 90, Hildebrand also testified to the same fact, as follows:

"Q. You were listed as a dealer?

A. Yes.

* * * * * * *

Q. You were a dealer at the time you met Mr. De Bon is that correct?

A. Yes."

And at R. 154, the appellant testified that he thought Hildebrand and Csaki were in a partnership.

"Q. One further question: When Csaki came into the transaction, as it then appeared he was then on the bill of sale, did you make any protest to Hildebrand or Csaki?

A. I thought they were in partnership as a dealer.

Q. You thought they were in partnership?

A. Yes.

Q. Did Hildebrand ever represent to you that Csaki was his partner?

A. No, but he told me that he had a partner, but I didn't know who he was and never met him until that day when I made final payment."

And at R. 150 DeBon further testified that he thought he was buying from a veteran dealer:

"Q. I should have said the 24th, just in regard to those White trucks: Didn't you think it was strange that Oscar Csaki, Hildebrand and yourself were together and these papers were executed by Csaki to you; didn't you think then that somebody's priorities were being used?

A. I didn't know it. I thought I was doing business with a dealer where I could buy from one dealer to another, like we do every day.

* * * * * * *

Q. You knew both these sales were on priorities?

A. Yes.

Q. Did you know that one of them was restricted to veterans alone?

A. Or veteran dealers."

On the basis of that testimony alone it is clear that Hildebrand was introduced to the appellant as a veteran dealer and that the Opinion of this Court upon the Petition for Rehearing reached an erroneous conclusion. In consequence, the question of law put by the jury to the trial judge for clarification, viz. (R. 202):

> "The third question is, Can a dealer buy on a veteran's priority and sell to a non-veteran on a commission basis?"

was a question highly material to the issues and the appellant was entitled to an instruction that if the jury found that Hildebrand held himself out to the appellant to be a veteran dealer the appellant was justified to rely on the representation and in buying the trucks. See *Bollenbach v. U. S.*, 326 U.S. 607, 612-614, and *M. Kraus & Bros. v. U. S.*, 327 U.S. 614, 617.

Furthermore, I desire to call to the Court's attention that the Government in this case failed to prove that the appellant had any intent to commit a crime, or any knowledge that a crime was being committed. This contention is proved by the Government's own witness, John Steven Hildebrand (R. 63).

> "Q. (by Mr. Tramutolo). All right, did you ever tell Mr. De Bon that you had to do anything

irregular or illegal and dishonest to get these trucks for him?

A. No, all I told Mr. De Bon was that all that I could do was put in for the units and just hope to get them, that was all."

Dated, San Francisco, California,
June 15, 1949.

Respectfully submitted,
CHAUNCEY TRAMUTOLO,
Attorney for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

The within petition for reconsideration of appellant's petition for a rehearing is well founded in point of law and fact and is not interposed for delay.

Dated, San Francisco, California,
June 15, 1949.

CHAUNCEY TRAMUTOLO,
Attorney for Appellant and Petitioner.

No. 11842

United States
Circuit Court of Appeals
For the Ninth Circuit

LOUIS RAPHAEL DE PRATU,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana

Rotary Colorprint, 870 Brannan Street, San Francisco 4-20-48—60

No. 11842

United States
Circuit Court of Appeals
For the Ninth Circuit

LOUIS RAPHAEL DE PRATU,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

MR. CHARLES DAVIDSON,
Great Falls, Montana, and
MR. ARTHUR P. ACHER,
Helena, Montana,

Attorneys for Appellant and Defendant.

MR. JOHN B. TANSIL,
United States Attorney,
Billings, Montana,
MR. HARLOW PEASE,
Asst. United States Attorney,
Butte, Montana, and
MR. EMMETT C. ANGLAND,
Asst. United States Attorney,
Butte, Montana,

Attorneys for Appellee and Plaintiff.

In the District Court of the United States in and for the District of Montana

No. 6747

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS RAPHAEL DE PRATU,

Defendant.

Be It Remembered, that on February 18, 1947, an Indictment was duly returned and filed herein in the words and figures following, to wit: [2*]

INDICTMENT

The Grand Jury Charges:

Count One

(Falsely Claiming U. S. Citizenship.)
(8 USCA 746(a) 18)

On or about June 27, 1946, at Helena, in the District of Montana, and within the jurisdiction of this Court, the above-named defendant, Louis Raphael De Pratu, did knowingly, falsely and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen of the United States, in that the said defendant, in an application for a retail liquor license under the laws of the State of Montana filed by him with the Mon-

*Page numbering appearing at foot of page of original certified Transcript of Record.

tana Liquor Control Board, did state as follows: "Are you a citizen of the United States? A. Yes," whereas in truth and in fact the said defendant was not then and never had been a citizen of the United States, which he, the said defendant, well knew.

Count Two

(Falsely Claiming U. S. Citizenship.)
(8 USCA 746(a) 18)

On or about January 15, 1946, at Helena, in the District of Montana, and within the jurisdiction of this Court, the above-named defendant, Louis Raphael De Pratu, did knowingly, falsely and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen of the [3] United States, in that the said defendant, in an application for a retail liquor license under the laws of the State of Montana filed by him with the Montana Liquor Control Board, did state as follows: "Are you a citizen of the United States? A. Yes," whereas in truth and in fact the said defendant was not then and never had been a citizen of the United States, which he, the said defendant, well knew.

Count Three

(Falsely Claiming U. S. Citizenship.)
(8 USCA 746(a) 18)

On or about September 11, 1946, at Sweetgrass, in the District of Montana, and within the jurisdiction of this Court, the above-named defendant, Louis Raphael De Pratu, did knowingly, falsely and felo-

niously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen of the United States, in that the said defendant, before a board of special inquiry of the Immigration and Naturalization Service of the United States, having been first duly sworn as a witness, did wilfully and knowingly testify in part as follows: "Q. Of what country are you now a citizen? A. United States * * * I acquired United States citizenship through my father who naturalized in the United States while I was a minor," whereas in truth and in fact, the defendant was not then and never had been a citizen of the United States, as he, the said defendant then well knew.

A True Bill.

T. LOYE ASHTON,
Foreman.

JOHN B. TANSIL,
United States Attorney. [4]

[Endorsed]: Filed February 18, 1947.

Thereafter, on June 2, 1947, the defendant appeared in Court, was duly arraigned and entered his plea herein, the minute entry thereof being in the words and figures following, to wit:

[Title of District Court and Cause.]

PLEA

Defendant was duly called for arraignment and plea this day, said defendant being personally present in Court, and Mr. Emmett C. Angland, Assistant United States Attorney, being present and appearing for the United States.

Thereupon the defendant answered that his true name is Louis Raphael De Pratu, whereupon, on inquiry by the Court, the defendant stated that he has an attorney in Great Falls, Montana, and that he desires to plead at this time. Thereupon the indictment was read to the defendant, whereupon the defendant entered a plea of not guilty. Thereupon the Court stated that the trial of this cause will be had on a date to be later fixed by the Court.

Entered June 2, 1947.

H. H. WALKER,
Clerk. [6]

Thereafter, on January 5, 1948, the defendant filed a Motion for Bill of Particulars, and a Notice of calling up said Motion for hearing, being in the words and figures following, to wit: [7]

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

Comes now the defendant and respectfully moves the Court for an order for a Bill of Particulars as follows:

1. With respect to Count One of the Indictment specifying the particulars in which the matter of defendant's citizenship was involved, and particularly the fraudulent purpose of the representation, and such details as are necessary to show that the representations were made to a person or body having adequate reason for ascertaining defendant's citizenship.

2. With respect to Count Two of the Indictment specifying the particulars in which the matter of defendant's citizenship was involved, and particularly the fraudulent purpose of the representation, and such details as are necessary to show that the representations were made to a person or body having adequate reason for ascertaining defendant's citizenship.
3. With respect to Count Three of the Indictment specifying the particulars in which the matter of defendant's citizenship was involved, and particularly the fraudulent purpose of the representation, and such details as are necessary to show that the representations were made to a person or body having adequate reason for ascertaining defendant's citizenship.
4. With respect to Count Three of the Indictment a more particular statement of the status of the person or persons to whom [8] it is alleged that the representations were made.
5. With respect to each count of the indictment specifying whether or not the charge contemplated is the making of a false statement under oath, or the making of a false statement.

The defendant is entitled to this Bill of Particulars, for the reason that the generality of the Indictment prejudices the defendant in the preparation of his defense, and endangers his constitutional guaranty against double jeopardy.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 5, 1948. [9]

[Title of District Court and Cause.]

NOTICE RE BILL OF PARTICULARS

To the Plaintiff above named, and to John B. Tansil, Esq., United States Attorney for the District of Montana, Harlow Pease, Esq., Assistant United States Attorney for the District of Montana, and Emmett C. Angland, Esq., Assistant United States Attorney for the District of Montana, attorneys for plaintiff:

You and Each of You Will Please Take Notice: That the Defendant's motion for Bill of Particulars in the above-entitled cause will be called up for argument and submission on the 7th day of January, 1948, in the Federal courtroom at the post office building, City of Helena, Montana, at the hour of 10:00 o'clock a.m., or as soon as counsel can be heard.

Dated this 5th day of January, 1948.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant.

Service of the foregoing Notice together with a copy of the Motion in the above-entitled cause referred to in said Notice, acknowledged this 5th day of January, 1948.

HARLOW PEASE,
EMMETT C. ANGLAND,
Attorneys for Plaintiff.

[Endorsed: Filed Jan. 5, 1948. [10]

Thereafter, on January 5, 1948, the defendant filed a Motion to Dismiss the Indictment herein, and a Notice of calling up said Motion for hearing, being in the words and figures following, to wit: [11]

[Title of District Court and Cause.]

MOTION TO DISMISS INDICTMENT

Comes now the defendant and moves the Court for an order dismissing the indictment on file herein, and alleges and avers:

1. That the first count of said Indictment fails to charge an offense against the laws of the United States of America, or at all.
2. That the second count of said Indictment fails to charge an offense against the laws of the United States of America, or at all.
3. That the third count of said Indictment fails to charge an offense against the laws of the United States of America, or at all.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 5, 1948. [12]

[Title of District Court and Cause.]

NOTICE RE MOTION TO DISMISS

To the plaintiff above named, and to John B. Tansil, Esq., United States Attorney for the District of Montana, Harlow Pease, Esq., Assistant United States Attorney for the District of Montana, and Emmett C. Angland, Esq., Assistant United States Attorney for the District of Montana, attorneys for plaintiff:

You and Each of You Will Please Take Notice: That the motion to dismiss in the above-entitled cause will be called up for argument and submission on the 7th day of January, 1948, in the Federal courtroom at the post office building, City of Helena, Montana, at the hour of 10:00 o'clock a.m., or as soon as counsel can be heard.

Dated this 5th day of January, 1948.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant.

Service of the foregoing Notice together with a copy of the motion in the above-entitled cause referred to in said Notice, acknowledged this 5th day of January, 1948.

JOHN B. TANSIL,
HARLOW PEASE,
EMMETT C. ANGLAND,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 5, 1948. [13]

Thereafter, on January 7, 1948, the cause came on regularly for trial, the minute entry of the proceedings of the trial on said date being in the words and figures following, to wit:

[Title of District Court and Cause.]

TRIAL

This cause was duly called for trial this day, defendant being personally present in Court, with his attorneys, Mr. Charles Davidson and Mr. Arthur P. Acher, and Mr. Harlow Pease and Mr. Emmett C. Angland, Assistants to the United States Attorney, being present and appearing for the United States.

Thereupon the motions, heretofore filed by the defendant, to dismiss the indictment, for a bill of particulars and for an order of inspection, were called up for hearing at this time. Thereupon the motion to dismiss was argued by counsel and submitted, whereupon, after due consideration, Court ordered that said motion be and is denied. Thereupon Court ordered that the motions for a bill of particulars and for an order of inspection be and are denied as not timely made.

Thereupon the trial of the cause was proceeded with, and the following named persons were duly empaneled, accepted and sworn as a jury to try the cause, to wit:

E. J. Garrahan, George W. Nelson, Agnes E. Olson, John H. Luberts, George Leckner, Morris Sanford, Charles W. Tinker, Harry Rich-

ardson, Lillian F. Watson, Martin T. O'Connell, Arthur L. Johnson and J. R. Venable.

Thereupon Charles H. Reed was sworn and examined as a witness for the United States, and two certain applications for retail liquor licenses, marked as plaintiff's exhibits Nos. 1 and 2, were offered in evidence, to which offers the defendant objected, whereupon the offers were withdrawn by the plaintiff at this time.

Thereupon Paul W. Smith was sworn and examined as a witness for the United States, and plaintiff's exhibits Nos. 1 and 2 were reoffered in evidence, to which offers the defendant objected, the objection being by the Court overruled and said exhibits admitted in evidence. Thereupon a certain application for retail beer license, marked defendant's exhibit No. 3 was offered in evidence, to which offer the plaintiff objected and the objection being by the Court sustained.

Thereupon the jury was duly admonished by the Court and excused until 10:00 a.m. tomorrow, and further trial of the cause was ordered continued until that time.

Entered January 7, 1948.

H. H. WALKER,
Clerk. [14]

Thereafter, on January 8, 1948, the cause came on regularly for further trial, the minute entry of the proceedings of the trial on said date being in words and figures following, to wit:

[Title of District Court and Cause.]

TRIAL

Defendant and Counsel for respective parties, with the jury, present as before and trial of cause resumed.

Thereupon Paul W. Smith was recalled and examined as a witness for the plaintiff, and a certain application for retail beer license was marked defendant's exhibit No. 4 for identification. Certain offers of proof, marked respectively, defendant's offers of proof Nos. 1, 2, 3, 4, and 5, were made by the defendant, to which offers the plaintiff objected and the objection as to each offer being by the Court sustained. Thereupon defendant offered in evidence his exhibit No. 4, heretofore marked for identification, to which offer the plaintiff objected and the objection being by the Court sustained. Thereupon a certified copy of Alien Registration Form and a certified copy of Non-existence of Naturalization Record, marked plaintiff's exhibits Nos. 5 and 6, respectively, were offered in evidence, to which offers the defendant objected, the objection as to each offer being by the Court overruled and said exhibits admitted in evidence.

Thereupon Frank S. Nooney and Arthur Matson were sworn and examined as witnesses for the United States, and certain portions of a document, marked as plaintiff's exhibit No. 7, were offered

in evidence, to which offer the defendant objected and the objection being by the Court sustained,

Thereupon the United States rested.

Thereupon the defendant moved the Court to strike certain testimony given by the witness Matson, for reasons stated in the record, which motion was by the Court denied. Thereupon defendant filed and presented to the Court a motion for judgment of acquittal herein, and also made an oral motion to order the entry of a judgment of acquittal for the reason that the evidence is insufficient to sustain a conviction under counts 1, 2 and 3 of the indictment. Thereupon the jury was excused from the courtroom, and in its absence the motions presented were argued by counsel, whereupon, after due consideration, Court ordered that said motions be and are denied.

Thereupon the jury was returned into Court and further trial of cause was proceeded with.

Thereupon Paul W. Smith was recalled and examined as a witness for the defendant, and that certain document marked defendant's exhibit No. 4, was reoffered in evidence, to which offer the plaintiff objected and the objection being by the Court sustained. Thereupon the defendant reoffered in evidence his exhibit No. 3, to which offer the plaintiff objected, the objection being by the Court overruled and said exhibit was admitted in evidence. Thereupon a certain offer of proof was made by the defendant, marked defendant's offer of proof No. 6, to which offer the plaintiff objected and the objection being by the Court sustained.

Thereupon Emma Lundby was sworn and examined as a witness for defendant, and a certified copy of the Charter of the Stockmens Club, marked defendant's exhibit No. 8, was offered and received in evidence over the objection of the plaintiff. A certified copy of the articles of incorporation of the Stockmens Club, marked defendant's exhibit No. 9, was offered in evidence by the defendant and objected to by the plaintiff, whereupon defendant withdrew his offer at this time. Certain entries contained in the minute book of the Stockmens Club were marked for identification as defendant's exhibits 10 to 18, both inclusive, and exhibits Nos. 10, 11, 12, 15, 17 and 18 were offered in evidence by the defendant. Thereupon plaintiff objected to the introduction in evidence of said exhibits, whereupon Court ordered that the objection as to exhibits Nos. 11 and 15 be sustained in part and overruled in part, and that the objection to exhibits Nos. 10, 12, 17 and 18 be sustained. [15]

Thereupon the jurors were duly admonished by the Court and excused until 10:00 a.m. tomorrow, and further trial of the cause was ordered continued until that time.

Entered January 8, 1948.

H. H. WALKER,
Clerk. [16]

Thereafter, on January 9, 1948, the cause came on regularly for further trial, the minute entry of the proceedings of the trial on said date being in words and figures following, to wit:

[Title of District Court and Cause.]

TRIAL

Defendant and counsel for respective parties, with the jury, present as before and trial of cause resumed.

Thereupon Emma Lundby was recalled and examined as a witness for the defendant, whereupon defendant rested and the evidence closed.

Thereupon defendant filed and presented to the Court a motion for judgment of acquittal, which motion was by the Court denied.

Thereupon, at the conclusion of all of the evidence, both parties having rested, Court announced its ruling on the instructions requested, heretofore presented to the Court, for specific charges to the jury, as follows: the Court refuses to give defendant's proposed instructions numbered 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 23, 24, 25 and 26, and the Court proposes to give defendant's proposed instructions numbered 3, 6, 17, 18, 22 and 7 as modified by the Court. Thereupon the defendant excepted to the Court's refusal to give his said proposed instructions above mentioned.

Thereupon, after the arguments of counsel and the instructions of the Court, to certain of which instructions the defendant excepted for reasons stated in the record, the following named persons were duly sworn as bailiffs for this case and for

all cases in which the jury may be given into their custody during the present term of this Court, to wit: Paul Erler, Edgar Taylor and Mary Shagina. Thereupon the jury retired in charge of sworn bailiffs to consider of its verdict, the Marshal being ordered and directed to furnish meals and lodging to the jurors and two bailiffs.

Thereupon, at 5:20 p.m., the jury returned into Court with its verdict, defendant and counsel for respective parties being present. Thereupon the verdict was duly received by the Court, ordered read and filed, and by the jury acknowledged to be its true verdict being as follows, to wit:

"(Title of Court and Cause)

"No. 6747—Verdict

"We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in the indictment on file herein.

"MORRIS E. SANFORD,

"Foreman."

Thereupon, on motion of counsel for defendant, Court ordered that the jury be polled, whereupon as the jurors' names were called they each answered that the verdict as read is their true verdict.

Thereupon, on motion of counsel for defendant, Court ordered that the time for pronouncement of judgment herein be continued until 10:00 a.m. Monday, January 12, 1948.

Thereupon Court ordered that the defendant's bond herein be and is exonerated and that the defendant be remanded to the custody of the Marshal pending pronouncement of judgment. Thereupon, for good cause appearing, Court ordered that the defendant be admitted to bail in the sum of $7500.00, to be regularly approved by an authorized officer if a property bond, or in the sum of $5000.00 cash bail to be deposited with the Clerk of this Court, on condition that the defendant will appear here for sentence at 10:00 a.m. on Monday, January 12, 1948.

Entered January 9, 1948.

H. H. WALKER,
Clerk. [17]

Thereafter, on January 9, 1948, the verdict of the jury was duly returned and filed herein, being in the words and figures following, to wit. [18]

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in the Indictment on file herein.

MORRIS E. SANFORD,
Foreman.

[Endorsed]: Filed Jan. 9, 1948. [19]

Thereafter, on January 12, 1948, the Court rendered its Judgment herein, which Judgment was duly filed, entered and docketed, and being in the words and figures following, to wit: [20]

[Title of District Court and Cause.]

Criminal Indictment in three counts for violation of Title 8, Section 746(a) 18, U. S. C. A.

JUDGMENT AND COMMITMENT

On this 12th day of January, 1948, came Emmett C. Angland, Esq., Assistant United States Attorney for the District of Montana, and the defendant Louis Raphael De Pratu appearing in his proper person and represented by his counsel Charles Davidson, Esq., and Arthur P. Acher, Esq.,

And the defendant having been convicted on the 9th day of January, 1948, by a verdict of the jury, duly and regularly impaneled and sworn, of the offenses charged in Counts One, Two and Three of the indictment in the above entitled cause, to wit: In Count One that said defendant, on or about the 27th day of June, 1946, at Helena, Montana, and in Count Two that said defendant, on or about the 15th day of January, 1946, at Helena, Montana, and in Count Three that said defendant, on or about the 11th day of September, 1946, at Sweetgrass, Montana, did knowingly, falsely and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen of the United States, whereas in truth and in fact

said defendant was not then and never had been a citizen of the United States, which he, the said defendant well knew.

And the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is By the Court Ordered and Adjudged that the said defendant Louis Raphael De Pratu, having been found guilty of the offense charged in Count One of the indictment, be committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for a term of sixteen months, and that he be fined the sum of Five hundred and no/100 ($500.00) Dollars, and be imprisoned until payment of said fine, or until otherwise discharged according to law: and the said [21] defendant having been found guilty of the offense charged in Count Two of the indictment, be committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for a term of sixteen months, and that he be fined the sum of Five hundred and no/100 ($500.00) Dollars, and be imprisoned until payment of said fine, or until otherwise discharged according to law; and the said defendant having been found guilty of the offense charged in Count Three of the indictment, be committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for a term of sixteen months, and that he be fined

the sum of Five hundred and no/100 ($500.00) Dollars, and be imprisoned until payment of said fine, or until otherwise discharged according to law.

It Is By the Court Further Ordered and Adjudged that the sentences of imprisonment herein imposed on Count One, Count Two and Count Three of the indictment, run concurrently and not consecutively.

It Is Further Ordered that the Clerk of this court deliver a certified copy of this judgment and commitment to the United States Marshal, or other qualified officer, and the same shall serve as a commitment herein.

R. LEWIS BROWN,
United States District Judge.

[Endorsed]: Filed and Entered Jan. 12, 1948.

Thereafter, on January 13, 1948, the defendant filed a Notice of Appeal herein, being in the words and figures following, to wit: [23]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Louis Raphael De Pratu, Great Falls, Montana.

Name and address of appellant's attorneys: Charles Davidson, Great Falls, Montana, and Arthur P. Acher, Helena, Montana.

Offense: The first count of the indictment charges the defendant and appellant with falsely claiming

citizenship in violation of Section 746 (a) (18) Title 8 U. S. Code, in that the defendant on or about June 27th, 1946, did knowingly, falsely and feloniously represent himself to be a citizen without having been naturalized or admitted to citizenship and without otherwise being a citizen.

The second count charges a like offense alleged to have been committed on January 15th, 1946.

The third count charges that the defendant and appellant on or about September 11, 1946, knowingly, falsely, and feloniously represented himself to be a citizen before a Board of Special Inquiry of the Immigration and Naturalization Service of the United States after having been duly sworn as a witness, allegedly in violation of the same statutory provision. [24]

Concise statement of judgment or order, giving the date and any sentence:

Judgment of conviction dated January 12, 1948, ordered:

That the defendant be committed to the custody of the Attorney General to serve a term of sixteen (16) months, upon Count I of the indictment, and to pay a fine of $500.00 with imprisonment until said fine is paid, or said defendant is otherwise discharged according to law;

That the defendant be committed to the custody of the Attorney General to serve a term of sixteen (16) months, upon Count II of the indictment, and

to pay a fine of $500.00 with imprisonment until said fine is paid, or said defendant is otherwise discharged according to law;

That the defendant be committed to the custody of the Attorney General to serve a term of sixteen (16) months, upon Count III of the indictment, and to pay a fine of $500.00 with imprisonment until said fine is paid, or said defendant is otherwise discharged accordingly to law;

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated January 13th, 1948.

/s/ LOUIS RAPHAEL DE PRATU,
Appellant.
CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Appellant.

Service of the foregoing Notice of Appeal admitted and receipt of copy thereof acknowledged this 13th day of January, 1948.

HARLOW PEASE,
Assistant U. S. Attorney,
EMMETT C. ANGLAND,
Assistant U. S. Attorney,
Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed Jan. 13, 1948. [25]

Thereafter, on January 13, 1948, an Order for Transmission of certain original exhibits was duly filed and entered herein, being in the words and figures following to wit: [26]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF EXHIBITS

Upon application of the defendant,

It Is Hereby Ordered, that the clerk of this Court be, and he is hereby, authorized to transmit to the United States Circuit Court of Appeals of the Ninth Circuit original exhibits 1, 2, 3, 4, 5, 6 and 7 introduced or offered at the trial of the above entitled cause as a part of the transcript of record.

Dated this 13th day of January, 1948.

R. LEWIS BROWN,
U. S. District Judge.

[Endorsed]: Filed and Entered Jan. 13, 1948.

Thereafter, on January 27, 1948, the Reporter's Transcript of the testimony and proceedings had at the trial of said cause, was duly filed herein, being in the words and figures following, to wit, and being Volume 2 of this transcript. [28]

In the District Court of the United States, District of Montana, Helena Division

No. 6747

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS RAPHAEL DE PRATU,

Defendant.

REPORTER'S TRANSCRIPT

Before: Honorable R. Lewis Brown, sitting with a Jury at Helena, Montana, January 7th, 8th and 9th, 1948.

Appearances: Mr. Harlow Pease, Asst. U. S. Attorney, and Mr. Emmett C. Angland, Asst. U. S. Attorney, Attorneys for Plaintiff; Mr. Charles Davidson, and Mr. Arthur P. Acher, Attorneys for Defendant. [30]

Be It Remembered, that this cause came on regularly for trial before the Honorable R. Lewis Brown, Judge of the District Court of the United States, District of Montana, Helena Division, sitting with a jury, on the 7th, 8th, and 9th days of January, 1948, Messrs. Harlow Pease and Emmett C. Angland, Assistant United States Attorneys, appearing as attorneys for the plaintiff, and Messrs. Arthur P. Acher and Charles W. Davidson appearing as attorneys for the defendant.

Thereupon, the following proceedings were had:

The Court: United States versus Louis Raphael De Pratu. Is the Government ready for trial?

Mr. Davidson: May it please the Court, in this cause, No. 6747, United States against Louis Raphael De Pratu, we have noticed for hearing for this morning motion to dismiss the [33] indictment on file in this matter, motion for bill of particulars, and motion for an order of inspection. Notice of all three motions have been served on the United States Attorney. While the papers filed may seem somewhat voluminous, I am sure the information desired can be furnished without causing the District Attorney serious inconvenience and without any delay in the trial, while at the same time the rights of the defendant will be more adequately protected.

It is only since this cause has been set for trial that this counsel was definitely retained to represent the defendant. While I have represented Mr. De Pratu in a number of civil matters, I do not ordinarily engage in criminal practice, and suggested to him that he retain counsel in Helena. However, when the case was set for trial, he brought me the notice of the setting about December 22, 1947, and insisted that I represent him and I immediately prepared and sent to Butte a motion for transfer of the case for trial from the Helena Division to the Great Falls Division which was denied on December 26, 1947. Immediately thereafter I was required to be out of the state, leaving on December 27th, and did not return to Montana until January 5,

1948. Prior to leaving the state, I had talked with Mr. Acher, attorney at law, at Helena, asking that he assist in the trial, but he did not agree at that time to help in the case. During my absence from the state, the defendant, Mr. De Pratu, talked with Mr. Acher, but it was not [34] until Saturday, January 3rd, that Mr. Acher was definitely retained to be associated with me in the case. As soon as I returned to Montana, I came to Helena and conferred with Mr. Acher and the motions which have been noticed this morning were immediately prepared, as were the notices of hearing. These were taken to Butte by me on Monday afternoon, January 5th, and served upon the United States Attorney.

We felt that this statement was due the Court to explain why these motions have not heretofore been made. Under Rule 12(b)(3), the motion to dismiss may be made after the plea is entered, and at this time we ask leave to make the motion to dismiss, although our arguments upon it will be exceedingly brief. If the Court wishes to hear argument, I would like to have Mr. Acher make our argument.

The Court: You proceed on that as you desire, Mr. Davidson. I will entertain a motion to dismiss, because, in my opinion, if the indictment does not state a public offense, the Court would have no jurisdiction, and the question of jurisdiction can be raised at any time, so I will hear the motion to dismiss.

* * * * * * *

Court: I am not going to listen to any arguments on the demand for a bill of particulars, and the demand is going to be denied, not being timely made. I don't intend to put the people of the United States to the expense of calling a jury into this court at the inconvenience of 70 citizens of the community, to come in here to present to me excuses that they have why they shall not be required to serve, to put the government to the expense of subpoenaing witnesses and bringing witnesses when the defendant in the case has had more than six months to do the things that he is doing now. This defendant was arraigned before me on the second of June, or about that time. He appeared without an attorney. Immediately upon seeing him here before me without an attorney, I interrogated him as to whether he did or did not have an attorney. He said he did have an attorney and didn't desire me to appoint an attorney. I explained to him the seriousness of the charge and asked him if he desired to go ahead with the plea and he did. I advised him at that time as to the setting of the case for trial at the next term of court, which under rule would be in [42] January, and he has had from that time until this time to know what he should do, and I think that I appreciated Mr. Davidson's statement to me that he and you both have just been called into the case, and I know, I have no doubt about that at all, but there is no one to blame. I don't know what happened to the attorney the defendant said he had. You are not to be blamed and no one else is to be blamed, but I don't intend to permit defendants to

trifle with the court in this manner. It may be that should I grant the motion now that has been made too late, it would or it might require a continuance of this case over the term, I don't know.

Mr. Acher: I think that the information which we require or request could be given by request on my part and answers in Court. The point is that we feel the government should specify by a bill of particulars if this indictment—(interrupted)

The Court: You may have been right and it may have been granted if timely made, but we operate under some kind of rules. There is a time and place for everything, and this defendant has had six months to make the demand he has made. I have been over here on several occasions holding law and motion days where this matter could have been presented to me and received my consideration, but to permit the defendant to sit idly by and do absolutely nothing to protect his own rights at all and then to come into Court on the eve of trial and after the jury is here and say that he will be prejudiced without [43] this information and lead the court to believe that all he desires is to escape trial at this term of court, expecting that something possibly might intervene between now and the next term of court and then he will not have to be tried. The defendant is entitled to a speedy trial under the constitution, and I intend to see that he gets it, and so are the people of the United States. They have some rights under the constitution, and one of the rights they have under the constitution is that if men have been guilty of serious public offenses, such as if they are convicted, they would probably

be sentenced to a penitentiary, that is the place they should be, and the people are entitled that they not be permitted to run loose and never be brought to the bar of justice. This is not in time to be made at all, and the only motion I am going to entertain is the motion to dismiss the indictment. That can be raised at any time. It might go to the jurisdiction of the Court, but as to the other motions, they are denied. [44]

* * * * * * *

(Whereupon, an adjournment was taken until 2:00 p.m., the same day, January 7, 1948, at which time the following proceedings were had:)

The Court: The Motion to Dismiss the indictment is denied. Draw a jury.

(Thereupon, after a jury was drawn and sworn, the following proceedings were had:)

TRANSCRIPT OF VOIR DIRE EXAMINATION OF THE TWELVE JURORS WHO SAT AS THE TRIAL JURY

After being duly sworn, the twelve jurors who sat as the trial jury in the above entitled case, testified as follows on their voir dire examination:

Examination of Mr. E. J. Garrahan

By Mr. Pease

Q. Mr. Garrahan, which is Mr. Garrahan. You may be seated, I just want to know which one I am asking. Where do you reside?

A. Livingston.

Q. What is your occupation?

A. Plumber.

Q. Have you ever heard of this case before now?

A. No, sir.

Q. Do you know the defendant?

A. No, sir.

Q. Do you know either Mr. Acher or Mr. Davidson, attorneys [236] for the defendant?

A. No.

Q. Have you ever come in contact with a case of this kind? By that I mean have you ever been a witness in such a case, or has any relative of yours been concerned in a case of this kind?

A. Not that I know of.

Q. Have you ever given particular attention to any news articles concerning a case of this kind?

A. I wouldn't say that I did.

Q. Is there anything in your mind which would place this kind of case in a different category or on a different basis from any other prosecution by the United States for an alleged violation of the laws of the United States? Is that clear or not?

A. No, not too clear.

Q. I will make it a little more simple. Can you sit as a juror in a case where this is the charge, that is, falsely claiming United States citizenship, and give it your thorough consideration without any prejudice or bias, just the same as if it were a charge of stealing government property or another federal offense? A. I would think so.

Q. There is nothing about the crime alleged here which places it subject to any prejudice on your part? [237] A. No.

Q. If selected on the jury, can you and will you try the case fairly and impartially? A. Yes.

Examination of Mr. George W. Nelson

By Mr. Pease

Q. Mr. Nelson, where do you live?

A. Deer Lodge.

Q. What is your occupation?

A. I am a rancher.

Q. Have you ever served on a jury before?

A. No.

Q. Either in state court or federal court?

A. No.

Q. Are you a man of family? A. Yes.

Q. Do you know the defendant in this case either personally, by reputation, by sight, or in any way?

A. No.

Q. Do you know his attorneys, Mr. Acher and Mr. Davidson, or either of them?

A. No, I don't.

Q. I will ask you if you have ever come in contact or ever given attention to a case in which a charge of this kind was made? [238]

A. No, I haven't.

Q. Is there anything about this case that puts it on a different basis from any other federal prosecution? A. No, there isn't.

Q. You don't have any personal views as to whether this is a good statute or not?

A. No, I haven't.

Q. You don't have any opinion as to the guilt or innocence of the defendant, or anything of that kind? A. No, sir.

Q. The indictment here, of course, is not evidence in the case, and should not give rise to any ideas or beliefs on the part of any member of the jury. I am asking you now as to whether you, if selected as a member of this jury, will be able to serve with complete impartiality, both to the government and to the defendant.

A. I believe I can.

Q. You don't know of anything in your mind at the present time which would work out to the disadvantage of either the government or the defendant? A. No.

Q. You will try the case on the law and the evidence? A. Yes. [239]

Examination of Mrs. Agnes E. Olson

By Mr. Pease

Q. Is it Mrs. Olson? Have you ever served on a jury before? A. No.

Q. Where do you live? A. East Helena.

Q. You are a housewife? A. Yes.

Q. What is your husband's occupation?

A. Smelter worker?

Q. Smelter worker? A. Yes.

Q. Well, you heard the explanation of the general nature of this case, Mrs. Olson, and I will ask you briefly if there is anything about the case which gives you any notions of it in advance of the hearing of evidence? A. No.

Q. You have never heard of the case before?

A. No.

Q. You don't know the defendant, I suppose?

A. No.

Q. Do you know Mr. Acher? A. No.

Q. Or Mr. Davidson? A. No.

Q. And there is nothing about the charge which I have described [240] here which gives you any prejudice or bias in regard to the case?

A. No.

Q. If you were selected as a member of the jury, you will try the case fairly and impartially?

A. Yes.

Examination of Mr. John Luberts

By Mr. Pease

Q. Mr. Luberts, where do you live?

A. Livingston.

Q. What is your occupation?

A. Carpenter.

Q. Have you ever served on either a state or federal jury? A. No, I haven't.

Q. This is your first experience being called on a jury? A. Yes.

Q. Have you ever heard of the case?

A. No.

Q. Read anything about it in the newspaper?

A. Just in the newspaper.

Q. Did you see something about it in the paper?

A. Yes.

Q. Did you form any opinion from what you read in the papers? A. No.

Q. Were any facts stated in the paper? [241]

A. No, it just mentioned the case.

Q. Did you gain—did there occur to you any feeling of bias or prejudice one way or the other as a result of reading the newspaper? A. No.

Q. You don't know the defendant, you said, I believe? A. No, I don't.

Q. Do you know his attorneys, either one of them? A. No.

Q. Have you ever given any attention to a charge of this kind in connection with any person whatever, anybody? A. No.

Q. A case of this kind never has come into your particular knowledge? A. No.

Q. Is there anything about the law making it a public offense to falsely claim United States citizenship which gives you any feeling one way or the other in a case of this kind? A. No.

Q. If you are selected on the jury here, can you and will you try the case fairly to both the government and the defendant? A. I think I will.

Examination of Mr. George Leckner

By Mr. Pease

Q. Mr. Leckner, where do you live? [242]

A. Boulder.

Q. What is your occupation?

A. Hotel and cafe operator.

Q. How long have you lived in Boulder?

A. Twelve years.

Q. Been in that business during that length of time? A. No, sir.

Q. What other occupation have you followed there?

A. I worked for the County there.

Q. Have you ever served on a jury?

A. Yes, sir.

Q. In what court? A. State court.

Q. Ever sit on a criminal case? A. No.

Q. Did you ever hear of this case before?

A. No, sir.

Q. Do you know Mr. Acher? A. No, sir.

Q. Or Mr. Davidson? A. No, sir.

Q. Did you ever read about this case?

A. No, sir.

Q. Did you ever hear about, read about, or be concerned with a similar case, that is, any case like this? [243] A. No, sir.

Q. Is there anything about that charge which gives the case to you any different color from any other federal prosecution? A. No, sir.

Q. You know, of course, the duties of a juror as to having an open mind in approaching a case?

A. Yes.

Q. I will ask you if your mind is free from any bias at this time? A. Yes, sir.

Q. Do you know the attorneys for defendant?

A. No, sir.

Q. If you are selected on the jury, you can and will give the government and the defendant a fair trial and abide by the instructions of the court?

A. Yes, sir.

Examination of Mr. Harry Richardson
By Mr. Pease

Q. Mr. Richardson, where do you live?

A. Clyde Park, Park County.

Q. What is your occupation? A. Farmer.

Q. Have you served on juries? A. Yes.

Q. State court or federal court, or both? [244]

A. Just in the County.

Q. Ever serve on a criminal case? A. One.

Q. You know, then, by experience, the duty of a juror to have an open mind? A. Yes.

Q. Is your mind open in this case?

A. Yes.

Q. Do you know anything about it at all, or have you any impressions concerning it, or concerning the Act of Congress which is the basis of the case?

A. No.

Q. Do you know the defendant? A. No.

Q. Do you know Mr. Acher or Mr. Davidson?

A. No.

Q. Can you and will you follow the instructions of the court and render a verdict in this case based solely upon the evidence and with all fairness and impartiality? A. Yes.

Examination of Mr. Morris Sanford

By Mr. Pease

Q. Mr. Sanford, where do you live?

A. Helena.

Q. What is your occupation? [245]

A. Insurance.

Q. You represent a state agency, do you?

A. I have my own local agency here in Helena.

Q. I see, and you are not what they call a general agent, then, I take it? A. No, I am not.

Q. Have you ever served on a jury?

A. In federal court, just federal court.

Q. You know then what the duties of a juror are, of course. Will you have any difficulty in this case, not by reason of any prejudice on your part, but by reason of any knowledge of any facts which would impress you? A. No.

Q. You don't know the defendant? A. No.

Q. Do you know his attorneys?

A. I know Mr. Acher.

Q. Is that an acquaintanceship of considerable standing?

A. No. I know him like I know attorneys in town, just know who they are.

Q. Have you in any piece of business worked with Mr. Acher? A. No.

Q. It is a social acquaintanceship then?

A. Just a speaking acquaintanceship.

Q. I see, no personal relationship or anything like that; and [246] as far as the type of the charge is concerned here, I take it you have no bias against the enforcement of this particular law any more than any other law of the United States?

A. No.

Q. And you will not be impressed or hindered in any way by the nature of the charge if you sit on this case? A. No.

Examination of Mr. Charles W. Tinker

By Mr. Pease

Q. Mr. Tinker, you reside where?

A. Livingston.

Q. What is your business? A. Salesman.

Q. With what concern are you associated?

A. Fuller Brushes.

Q. How long have you lived in Livingston?

A. A little over two years.

Q. Where did you live before that?

A. Sheridan, Wyoming.

Q. You have followed that profession of salesman for some years?

A. I have been with Fuller's only since September. I was with Montgomery Ward's before that.

Q. Have you ever served on a jury?

A. Yes. [247]

Q. Where? A. State.

Q. State of Montana?

A. In Livingston.

Q. Do you know the defendant in this case?

A. No, sir.

Q. Or his attorneys, either one of them?

A. No, sir.

Q. Do you know, or have you heard anything purporting to be any of the facts in this case?

A. No.

Q. You have no opinion on the merits of the case? A. No, sir.

Q. You have no bias or prejudice?

A. No, sir.

Q. You are in favor of the enforcement of all United States laws impartially? A. Yes.

Q. And if selected you will so act fairly and impartially? A. Yes, sir.

Examination of Mrs. Lillian F. Watson

By Mr. Angland

Q. Is that Mrs. Watson? A. Yes.

Q. Where do you reside? [248]

A. In Helena.

Q. Housewife, are you? A. Yes.

Q. What is the nature of your husband's employment?

A. Electric and steam engineer.

Q. For what concern?

A. Kessler Brewing Company.

Q. Mrs. Watson, have you ever been called as a juror? A. No.

Q. This is your first experience in being in court? A. That's right.

Q. Did you hear Mr. Pease's statement of the nature of this case, that is, the charge made by the grand jury against the defendant? Is there anything about the nature of this case that would cause you to be biased or prejudiced in any way, Mrs. Watson? A. No.

Q. You feel you can and will try the case involving this type of charge just as you would any other charge that might be made against an individual? A. Yes.

Q. Are you acquainted with Mr. Acher or Mr. Davidson? A. No.

Q. Are you acquainted with Mr. De Pratu?

A. No. [249]

Q. Mrs. Watson, the duties of a juror are, of course, explained to them by his Honor, and you will follow his directions and instructions to the jurors if you are chosen as a trial juror in this case, will you? A. Yes.

Q. And on the facts of the case you will be bound by the evidence presented to you in court, and that evidence presented in court only, is that right? A. That's right.

Q. And the law given to you by his Honor?

A. That's right.

Q. And you can and will follow the instructions and give the government fair and impartial treatment and give the defendant fair and impartial treatment? A. I will.

Examination of Martin T. O'Connell

By Mr. Angland

Q. Mr. O'Connell, where do you reside?

A. Bozeman.

Q. What is your occupation?

A. Laundryman.

Q. What was that?

A. I run a laundry.

Q. Have you lived in Bozeman for some period of time? A. All my life. [250]

Q. Mr. O'Connell, did you hear Mr. Pease's statement of the nature of the charge made against the defendant? A. Yes, sir.

Q. Is there anything about the nature of this case that would cause you to be biased or prejudiced in any way? A. No, sir.

Q. You can give the charge made under this act of Congress the same consideration you would give any other charge which might be made?

A. Yes, sir.

Q. Are you acquainted with the defendant, Mr. De Pratu? A. No, sir.

Q. Are you acquainted with either Mr. Davidson or Mr. Acher, his attorneys? A. No, sir.

Q. Have you ever sat on a jury before, Mr. O'Connell? A. No, sir.

Q. This is your first experience being called?

A. Yes, sir.

Q. You, of course, have some ideas of the duties of a juror? A. I do now.

Q. Since you have heard statements made in court. And you feel you could act as a fair and impartial trial juror if called in this case?

A. Yes, sir. [251]

Q. And can give the defendant a fair and impartial trial and the government a fair and impartial trial? A. Yes, sir.

Examination of Mr. Arthur L. Johnson

By Mr. Angland

Q. Mr. Johnson, where do you reside?

A. Machinist.

Q. Where do you reside?

A. What was that?

Q. Where do you live? A. Helena.

Q. You are a machinist by occupation?

A. Yes, sir.

Q. By whom are you employed?

A. Northern Pacific Railroad.

Q. How long have you lived in Helena, Mr. Johnson?

A. Off and on all my life, just 54 years. I have been away at times for short periods.

Q. Have you ever been called as a juror before this time? A. Once.

Q. Did you sit on a case at that time?

A. I was excused.

Q. You didn't sit on the trial of any case?

A. No, I didn't.

Q. You understand the duties of a juror will be explained to [252] you by his Honor?

A. Yes, sir.

Q. And your duties in this case particularly will be explained to you, and you will be bound by his instructions in that regard?

A. Sure, to the best of my ability.

Q. You heard Mr. Pease's statement concerning the charge made in this case?

A. No, due to his character of voice, his particular type of voice, I wouldn't say I understood half a dozen words he read or spoke.

Q. Did you hear the portion of the indictment that I read to Mr. Terry a moment ago?

A. Yes, I understood quite a lot of that what you read to the gentleman.

Q. You did hear that?

A. Quite a bit of it, yes.

Q. You don't think you heard it all?

A. No, I don't.

Q. Well, the charge made against the defendant in count one of the indictment is that on or about June 27, 1946, at Helena, Montana, the defendant did knowingly, falsely and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship and without otherwise being a citizen of the United States in that the defendant, [253] in an application for a retail liquor license under the laws of the State of Montana, filed by him with the Montana Liquor Control Board stated as follows, quote

Are you a citizen of the United States, his answer, Yes, end of quote, whereas in truth and in fact the defendant was not then and never had been a citizen of the United States, which he, the said defendant, well knew. Now, the second count of the indictment is substantially the same, except that it is charged he committed that offense on January 15, 1946, the first count is on June 27th and the next one January 15, 1946, and the third count of the indictment charges that on or about—(interrupted)

The Court: No need reading it. The third count is exactly the same as the first two counts, except it is said that on September 11, 1946, he said he was a citizen of the United States in response to questions propounded to him by the Board of Inquiry of the Immigration and Naturalization Service of the United States. In other words, the charges are substantially the same, except in the first two counts the statement was made to state officials, and in the third count it was made to government officers. Proceed.

Q. Now, do you understand the nature of the charge made, Mr. Johnson? A. Yes, I do.

Q. Congress, of course, has provided by an Act, that if he did these things, he is guilty of an offense. Is there anything [254] about the nature of that charge that would cause you to be biased or prejudiced in any way? A. No, there isn't.

Q. You feel you could try this type of case fairly and impartially just as you might try any other case in which you might be called to act?

A. Yes, sir.

Q. Are you acquainted with the defendant, Mr. De Pratu? A. No, I am not.

Q. Are you acquainted with either of his attorneys, Mr. Acher or Mr. Davidson?

A. I have met Mr. Acher several years ago, ten years ago. I just had the pleasure of meeting him.

Q. Nothing you know of would prevent you from acting as a fair and impartial trial juror if you were chosen to sit in this case?

A. No, there isn't.

Examination of Mr. J. R. Venable

By Mr. Angland

Q. You reside in Livingston, Montana?

A. Yes, sir.

Q. What is your occupation?

A. Locomotive fireman, for the Northern Pacific Railroad.

Q. Have you ever heard anything about this case before you came into Court this morning, Mr. Venable? A. No, sir. [255]

Q. Did you hear the statement made by Mr. Pease? A. Yes, sir.

Q. You understand the nature of the charge made against the defendant? A. Yes, sir.

Q. Anything about the nature of the case that would cause you to be biased or prejudiced in any way? A. No, sir.

Q. You feel you could try the case fairly and impartially if you were chosen as a trial juror?

A. Yes.

Q. Are you acquainted with the defendant or Mr. Davidson or Mr. Acher, his attorneys?

A. No, sir.

Examination of George W. Nelson

By Mr. Acher

Q. Mr. Nelson, you understand that this is a criminal charge wherein the government must prove the guilt of the defendant beyond a reasonable doubt. Do you have any quarrel with that rule of law that provides that the burden is upon the government to establish the guilt of the defendant beyond a reasonable doubt? Does that sound like good law to you? A. Yes.

Q. In other words, in France, if the accusation is made the burden is upon the accused to acquit himself, but you understand we do not follow that system here in this country. The government must prove its case beyond a reasonable doubt?

A. Yes.

Q. Now, the Court will instruct you as to the law of the case [256] and you will be directed to take the law from the Court and not from what we lawyers may say. Do you think that is good law, that that should be the rule? A. Yes.

Q. The Court will also instruct you that you are the exclusive judges of the facts, what witnesses to believe, and where the truth lies in the case, and if the Court does so instruct you, you will have no hesitancy in following that instruction? In other words, in the state court, the instructions are given typed out and read to you, and they are abstract principles of law. In the federal court, his Honor instructs you orally, and he has the

right to comment on the evidence. However, he will also tell you that regardless of what he may say as to the facts, it is still your duty to decide the facts, and you will if you are so instructed, follow that law in spite of any comment the Court might make as to what he thought the facts were, would you not? A. Yes.

Q. His Honor will, no doubt instruct you that the defendant need not testify in his own behalf and that no adverse conclusion can be drawn from his failure to testify. It hasn't been decided whether he will or won't, but if defendant should not testify and the Court instructs you that you should not derive any unfavorable inference from that failure, you would have no hesitancy in following that instruction? [257] A. No.

Q. You can see the reasonableness and fairness of such instruction? A. Yes, sir.

Q. Now, in the case the charge is in the first two counts a trifle different than the third count. The first two counts say that in an application for a liquor license the defendant knowingly, falsely and feloniously represented himself to be a citizen, whereas he was not a citizen. Now, if the Court should instruct you that the word knowingly, as used in this charge, means with guilty knowledge, that is, deliberately and not something which is merely careless, negligent or inadvertent, you would have no hesitancy in following that instruction, would you? A. No.

Q. In other words, when the accusation says knowingly, that word is to be considered by you in

the proof to see whether or not, even though the statement were made, it comes within the definition of being deliberate and not something which is merely careless, negligent or inadvertent. The accusation says that the statement was made falsely, and if his Honor should instruct you that the word falsely, as used in this charge, means something more than an untruth, and means something perfidiously or treacherously, or with intent to defraud, you would have no hesitancy in following that instruction? [258]

A. I don't know.

Q. If the Court so instructed you, you would follow that instruction? A. Yes.

Q. In other words, if the Court says the word falsely, as used here means something more than not being true, it means something perfidious, or treacherous, or with intent to defraud, and those elements were present in the man's mind before he could be guilty, you could follow that instruction, could you not? A. If I was told, yes.

Q. And the government, in its charge, has said that that was done feloniously. Now, that word has a definite meaning, and if the Court should instruct you it means that the act was done with a mind bent on doing what is wrong, or, as has been said, with guilty mind, in other words, if the defendant did this thing feloniously with a guilty mind, you would follow that instruction and require the government to prove he had that state of mind before you find him guilty, is that correct? A. Yes.

Q. The Third count of the indictment is somewhat different than the first two. It charges that

the defendant, having been duly sworn before a Board of Inquiry of the Immigration and Naturalization Service of the United States, did wilfully and knowingly testify falsely that he was a citizen, whereas, he [259] wasn't a citizen. Now, if the Court should instruct you that the word "wilfully," as used in that charge, means that it must be an intentional act, and not something accidental or inadvertent, you would have no hesitancy in following such an instruction, would you, Mr. Nelson?

A. No.

Q. If the Court should instruct you that under the third count of the indictment there is a greater burden on the government to prove the charge than there is in the first two counts—(interrupted)

The Court: The Court will give no such instruction as that. There is only one burden on the government, and that is beyond a reasonable doubt. That is the burden in a criminal case, and you will understand, jurors, that in questions that counsel propounds to you if the Court instructs such and such, you will do this or that, you will not get any idea at all from that that I intend to so instruct you. There will be no instruction that there is any different burden of proof on the government under the third count than there is in the first one.

Mr. Acher: That there would be corroboration required is the point I wish to make.

The Court: There will be no charge given to the jury that there will be corroboration required any more on the third count than on the other two.

Mr. Acher: Very well. [260]

Q. I take it that neither Mr. Angland or Mr. Pease have ever represented you in any matter?

A. No.

Q. There is nothing in your mind that leads you to believe you could not give the defendant a fair and impartial trial if you were selected to act as a juror?

A. No, sir, I don't believe there is.

Examination of Mr. E. J. Garrahan

By Mr. Acher

Q. Mr. Garrahan, you have heard my interrogation of Mr. Nelson. You have no quarrel with the rule that the burden is on the government in this case to prove its case beyond a reasonable doubt, and you, if selected here, will require the government to prove the case against the defendant beyond a reasonable doubt before you would find against him, would you not? A. Yes.

Q. You understand that in a civil case, you have the right to decide the case for the side who has the greater weight of evidence on their side. In other words, if you put it on scales, whichever side weighs the most, you have the right to go their way, but you understand that isn't the rule in a criminal case, but in a criminal case the government must prove it beyond a reasonable doubt. A. Yes.

Q. Now, you understand what evidence is, and if his Honor [261] should instruct you that the indictment, the charge that has been filed, is no evidence against this man, but is merely a procedure

to get the case into Court, you would have no hesitancy in following that instruction, you could follow that instruction? In other words, you don't come into Court saying, "Well, they filed the charge against this man, he must be guilty." You don't have that feeling at all? A. No.

Q. You will leave your mind open and make the government prove the case beyond a reasonable doubt? A. That's right.

Q. Before you find against the defendant?

A. Yes.

Q. Have you any quarrel—assuming his Honor instructs you that even though the defendant made a statement as to his citizenship, it has to be made knowingly and has to be falsely made, and by knowingly, if the Court should instruct you that that meant with guilty knowledge and deliberately and not something which was merely careless, negligent or inadvertent, would you have any hesitancy in following that instruction? A. No.

Q. You could do so? A. Yes.

Q. And likewise, that if the word feloniously is used—the government charges that this statement was made feloniously—and [262] if the Court instructs you that this means made with a mind bent on doing what is wrong, something he did with a guilty mind, you would have no hesitancy in following that instruction? A. I don't think so.

Q. In other words, if some man made certain statements about his citizenship, but you concluded he didn't do it feloniously or falsely, as the Court

will define those terms, you would have no hesitancy in returning the verdict for the defendant?

A. That's right.

Q. Has either Mr. Peas or Mr. Angland ever acted as your attorney, these two gentlemen?

A. No, sir.

Q. Is there anything that you know or have heard that would lead you to believe you could not give the defendant a fair and impartial trial if you were selected?

A. I don't know of anything.

Examination of Mrs. Agnes E. Olson

By Mr. Acher

Q. Mrs. Olson, I don't believe I recall the District Attorney asking whether you had sat on a jury before. A. No.

Q. You did not? A. No.

Q. You are familiar, however, with the rule that in a criminal case the government must prove its case beyond a reasonable [263] doubt?

A. Yes, sir, I am.

Q. You have no quarrel with that principle of law, and you feel you could follow it without any holding back on your part? A. Yes.

Q. And that the defendant doesn't have to prove anything. He has the right to stand here and say nothing, but still you can draw no unfavorable inference from that fact, if he doesn't testify. If the Court so instructs you, you could still require the government to prove its case beyond a reasonable doubt? A. Yes.

Q. If the Court should instruct you that you are the sole and exclusive body that decides the facts, which witnesses to believe, where the truth is on the facts, you could follow that principle without any difficulty, could you not?

A. Yes, I think so.

Q. If the Court should tell you, as he will, that he is the sole judge of the law, and what he says is the law you must follow, you will do that, of course?

A. Yes.

Q. But, if the Court should, in the course of his statements with respect to the law, make certain observations as he has the right to do as to the facts, the mere fact that he is the judge will not let you say to yourself, "I will surrender up [264] part of my prerogative to him." You will still judge the case on the facts, as it is your duty to do, would you not? A. Yes.

Q. In this case it is charged that these statements were made falsely and feloniously and knowingly, and in the third count the word wilfully is used too. If the Court should instruct you that before the defendant can be guilty, you must find that he did these things—we will assume they were done as charged; we will just assume that the statement was made that the man was a citizen and he wasn't a citizen—but still if the Court instructs you you have to determine it was done falsely and that that meant something more than untrue, that it meant perfidiously or treacherously, or with intent to defraud, you would have no hesitancy in following that instruction, would you? A. No.

Q. Or that the word feloniously means with guilty mind and not something accidental, negligent or inadvertent, but something deliberate, a man making false statements when he knows what he is talking about. Are you acquainted with either Mr. Pease or Mr. Angland, the attorneys for the government? A. No.

Q. Is there anything you know about that I don't know about. Suppose you were representing Mr. De Pratu and I was sitting up there and had your state of mind—I don't know your state of [265] mind, you are the only one that does—assuming you were defendant's lawyer and I was up there with your state of mind, would you let me sit as a trial juror? A. Yes, I believe I would.

Examination of John H. Luberts

By Mr. Acher

Q. Mr. Luberts, you hadn't sat on a jury before?

A. No, I haven't.

Q. Can you follow without any hesitation the rule of law that the government must prove its case against this defendant beyond a reasonable doubt?

A. I can.

Q. You will require them to do that before you would find this man guilty. A. Yes.

Q. There is no feeling in your mind right at this moment that this man must be guilty of something or he wouldn't be here in court?

A. Not a bit.

Q. You understand the written charge is no evidence against him or any kind or character?

A. Yes.

Q. If the Court should instruct you that you are to take the law from the Court exclusively and not from what we lawyers say, you will have no hesitancy in following that instruction? [266]

A. No.

Q. If he also tells you that you are the sole and exclusive judge of the facts in the case, what witnesses to believe and where the truth lies on the facts, you will take the responsibility and do your job, would you not? A. I would.

Q. Even though the Court should make comments, which he has the right to do under the federal practice; he can tell you what he thinks the facts are, but you will still remember that while he, as a matter of law has the right to tell you what the law is, you still have the prerogative of deciding on the facts? A. Yes.

Q. In this case the charge is that these representations were made feloniously, falsely and knowingly, and you would have no hesitancy—or you will follow the instructions as to the significance of those words, and if his Honor should instruct you they mean it must be done deliberately and with guilty mind, and not something merely careless, or inadvertent, you would have no hesitancy in following such instruction, would you? A. No.

Q. Neither Mr. Pease nor Mr. Angland has ever acted as attorney for you? A. No.

Q. You know of no matter or thing which would prevent you from giving the defendant a fair and impartial trial? [267] A. There isn't.

Examination of George Leckner

By Mr. Acher

Q. Mr. Leckner, you will enter upon this case with an open mind, and won't consider the fact because the government has brought this charge there must be something to it. You have no opinion one way or the other at this time? A. No, sir.

Q. You will require the government to prove its case beyond a reasonable doubt? A. Yes.

Q. Now, you understand that the Court will instruct you as to the law, but in the course of his instructions he will tell you you are the sole and exclusive judges of the facts, that you will find them in the light of what he tells you the law is?

A. Yes, sir.

Q. You will do that, you will assume the responsibility which the government has placed in you if you are selected and you will decide the facts?

A. Yes, sir.

Q. And you will not let what the lawyers say or what the Judge says influence you as to your honest opinion on the facts, only, of course, subject to the rules of law that the Court will give you?

The Court: Just a minute. That is an improper question [268] coupling what the attorneys say with what the judge says. The judge speaks with more authority than the attorneys. I will charge you with reference to that at the end of the trial, but don't get any impression from counsel that the judge speaks with as little authority as attorneys do when making their argument.

Mr. Acher: I didn't mean that.

The Court: I don't know. That is what you said. I don't want to give that impression. The judge does speak with authority when he charges the jury.

Q. His Honor will instruct you as to the elements that go to make up the crime, the different things you must find from the evidence. The charge includes the words feloniously, falsely and knowingly, and his Honor will instruct you as to what those words mean, and before you can find him guilty, you will consider the facts in the light of the Court's instructions, will you not, without any hesitation on your part? A. Yes.

Examination of Morris Sanford

By Mr. Acher

Q. You have heretofore sat on juries in this Court? A. I have.

Q. What year.

A. About twice during the last 10 years.

Q. You have sat on criminal cases? [269]

A. I have.

Q. And, of course, you have heretofore heard instructions under which you would require the government to prove its case beyond a reasonable doubt before you would find for the government and against the defendant. A. I would.

Q. And you will consider carefully the instruction with respect to the elements that go to make up the crime, that these things. if done, were done falsely, feloniously and knowingly? A. Yes.

Q. And you would carefully analyze the evidence and apply it to those definitions if you were selected?

A. Yes.

Q. Has either Mr. Angland or Mr. Pease acted as your attorney? A. They have not.

Examination of Charles W. Tinker

By Mr. Acher

Q. Mr. Tinker, you stated you were on a jury in Livingston? A. Yes, sir.

Q. What year was that?

A. Last fall, 1947.

Q. What case were you on, do you recall?

A. Case of Louis Olson against State.

Q. That was one at Chadborn?

A. McDonald against State of Montana. [270]

Q. State against McDonald, do you mean?

A. Yes.

Q. And State against Olson? A. Yes, sir.

Q. And you won't require the defendant to prove anything; I mean you will always keep in mind that the government has the burden of proof in the case?

A. Yes, sir.

Q. You won't consider that the indictment or charge here is any evidence against this man?

A. No, sir.

Q. And you will, after you have been advised by the Court as to the elements that go to make up this crime, that is, the representation as to citizenship must have been made knowingly, feloniously and falsely; you will consider the definition of those words carefully in determining whether the defendant committed the crime, will you not?

A. Yes, sir.

Q. Do you know of any matter of thing which would prevent you from trying this case fairly and impartially for the defendant? A. No, sir.

Examination of Harry Richardson

By Mr. Acher

Q. Mr. Richardson, you were on the jury last fall, too, at Livingston? [271] A. No.

Q. What year were you?

A. It has been 20 years ago.

Q. How long? A. Twenty years or more.

Q. If you are selected, you will require the government to prove its case here beyond a reasonable doubt? A. Yes, sir.

Q. You don't consider that the charge which has been filed is any evidence against the defendant?

A. No.

Q. And if you are selected, after you have taken the law from the Court as he will instruct you, you will apply the law to the facts to the best of your ability, will you not? A. Yes.

Q. And in considering this charge, if his Honor instructs you as to the elements that go to make up the offense, that is, in addition to the representation that was made, "I am a citizen," and we will assume he wasn't a citizen, if his Honor instructs you this has to be done knowingly, falsely and feloniously, and defines those terms to you, you will consider those definitions carefully in determining whether or not the man committed a crime, will will you not? A. Yes, sir. [272]

Examination of Lillian F. Watson

By Mr. Acher

Q. I didn't hear your answer about your occupation or your husband's. A. Housewife.

Q. And your husband's?

A. Electric and steam engineer.

Q. Where is he employed?

A. Kessler Brewing Company.

Q. You heard my questions to these various jurors about our side of the case, have you not?

A. Yes, I did.

Q. Is there anything I suggested that raised a question in your mind that you couldn't be a fair and impartial juror? A. No.

Examination of Martin T. O'Connell

By Mr. Acher

Q. Mr. O'Connell, what is the name of your laundry? A. Gallatin Laundry.

Q. Is that a local institution or a chain concern?

A. It is local.

Q. Just local. You heard my questions to the various jurors here this afternoon, have you not?

A. Yes, sir.

Q. Is there any question I asked that raised a question in your mind so you would feel you couldn't give the defendant a [273] fair and impartial trial?

A. No, sir.

Examination of Arthur L. Johnson

By Mr. Acher

Q. If you are selected as a juror, you will require the Government to prove its case beyond a reasonable doubt before you will return a verdict against the defendant, will you not?

A. Yes, I would.

Q. Did you hear my questions to the various jurors here this afternoon?

A. Yes, I understood you quite thoroughly.

Q. Was there anything said in the course of my questions which crossed your mind which leads you to believe you wouldn't be qualified or couldn't give the defendant a fair trial if you were selected, anything that was said here? A. No.

Q. If you were selected, you would give the defendant a fair and impartial trial in this case?

A. Yes, sir, I would.

Examination of J. R. Venable

By Mr. Acher

Q. If selected as a juror, you would require the Government to prove its case beyond a reasonable doubt before you would return a verdict against this defendant, would you not? A. Yes, sir.

Q. You will listen carefully to the instructions given to you by the Court and endeavor to consider all the elements of the crime being charged. that the statements were made knowingly, falsely and

feloniously, and you will consider the Court's definition of those words to decide whether or not the man is guilty of the crime, will you not?

A. Yes, sir.

Q. You have never been represented by Mr. Pease or Mr. Angland in any legal matter?

A. No.

Q. You know of no reason why you shouldn't try the case fairly and impartially? A. No.

Thereafter, defendant waived his sixth and remaining peremptory challenges and the Government waived its fourth and remaining peremptory challenges. [275]

United States of America,
State of Montana—ss.

I, John J. Parker, Official Court Reporter in the District Court of the United States, District of Montana, Helena Division, do hereby certify that the foregoing annexed transcript is a true and correct transcript of the voir dire examination of the jurors who sat as the trial jury in Criminal Action No. 6747, United States of America, Plaintiff, vs. Louis Raphael De Pratu, Defendant, tried before the Honorable R. Lewis Brown sitting with a jury, in the Federal Building at Helena, Montana, on January 7th, 8th, 9th, 1948.

/s/ JOHN J. PARKER,
Official Court Reporter. [276]

The Court: Make your opening statement on behalf of the Government.

(Thereupon Mr. Pease made the opening statement for the Government.)

* * * * * * *

The Court: Do you desire to make your statement now?

Mr. Archer: Reserve it, if I could.

The Court: Very well. Call your first witness.

CHARLES H. REED

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pease.

Q. Please state your full name.

A. Charles H. Reed.

Q. Where is your residence? [50*]

A. In Helena now.

Q. And what official position do you hold with the State of Montana at this time?

A. I am acting administrator of the Montana Liquor Control Board.

Q. How long have you occupied the position of acting administrator?

A. Since the first of the year.

Q. That is, since the first day of January?

A. First day of January, that's right.

*** Page numbering appearing at foot of page of Reporter's certified Transcript of Record.**

(Testimony of Charles H. Reed.)

Q. Of this present month? A. Yes, sir.

Q. Have you in your custody, in your official custody, the records of the Montana Liquor Control Board? A. Yes, sir.

Q. And those are located in the office of the Administrator, are they not? A. Yes, sir.

Q. In this city? A. Yes.

Q. Now, do you have among those records an application for a retail liquor license on behalf of the defendant in this case, Louis P. De Pratu?

A. Yes, sir, that was what I was supposed to bring.

Q. How many do you have? [51]

A. Two. May it be understood that I get those back?

Mr. Pease: The witness, your Honor, has asked that provision be made for the return of the exhibits after they have served their purpose. I presume there will be no question about that being done after the case is disposed of.

The Court: Well, of course, as far as that is concerned, the witness, as a state official, is not required to place state records out of his possession in any way, shape or form. If he desires to do it, it will be returned to him.

The Witness: They are the originals and only copy of those applications.

The Court: You are responsible for them as a state officer, and this Court's process will not require you to put these records out of your possession. If you desire to do it, they will be returned to you.

(Testimony of Charles H. Reed.)

Mr. Pease: If the Court please, we will be able to expeditiously furnish copies of the instruments, but we cannot furnish facsimilies of the signatures on them, which might possibly become of some moment, and I would like to have the privilege of using them here.

The Witness: I am willing to leave them here with you during the trial of the case.

The Court: Very well. Proceed.

Q. (By Mr. Pease): Mr. Reed, I would like to have you remove——(interrupted) [52]

Mr. Acher: One moment. To which we object on the ground that—I would like to ask a question or two to lay the foundation for this objection.

The Court: No. That is the Government's exhibit, and they have a perfect right to offer anything they want. If he wants to tear it apart, it is still in his possession and he can do anything he wants with it.

Mr. Pease: In view of the objection——(interrupted)

The Court: There isn't any objection before the Court at all. Proceed.

Q. (By Mr. Pease): Well, then, remove the beer license. Now, Mr. Reed, I show your plaintiff's Exhibit 1 and ask you if that is one of the permanent official files of the Montana Liquor Control Board? A. That is correct.

Q. Can you state the time or approximate time of its having been filed with the Liquor Control Board? A. The date is on here.

(Testimony of Charles H. Reed.)

Q. What is the date?

A. The 27th day of June, 1946.

Q. And I am handing you plaintiff's Exhibit 2, and ask you to state if that is one of the permanent official records of the Montana Liquor Control Board? A. Yes, sir.

Q. And can you state when that was filed? [53]

Mr. Acher: One moment, to which we object on the ground the witness has said he became head of this department on January 1 of this year, and I don't see how he would be qualified to give testimony as to when papers were filed before his tenure of office.

The Court: Well, the filing mark is on there, and that is what the witness is testifying from. He is not purporting to testify from his own personal knowledge. Just read the filing date if there is a filing date on it.

A. 15th day of January, 1946.

Q. What do your records show with reference to whether a license, a retail liquor license, was issued by the Board upon the application which is plaintiff's Exhibit 1 and upon the application which is Exhibit 2?

Mr. Acher: One moment. To which we object upon the ground that the records are the best evidence.

The Court: Yes, that is true. If they have a record as to whether it was issued or not, the record is the best evidence.

(Testimony of Charles H. Reed.)

Mr. Pease: My information is that the Board does not retain duplicates. Do you have a record as to whether or not a license was issued on this application?

A. Yes. We make them out in duplicate and we keep the duplicate. It is no doubt on file in the office.

Q. Do you have a record as to the issuance of a license?

The Court: He just said that he did have. He said that he has [54] a duplicate on file in his office, which constitutes the record, as I understand his answer.

Q. Calling your attention to the upper right-hand corner of the first page of plaintiff's Exhibit 1, I will ask you if that is one of the records with reference to the issuance of a liquor license?

A. Yes, sir, this is—in the file, the whole thing you mean?

Q. If, in the administration of your office, you make a notation in that box in the upper right-hand corner showing the number of the license issued?

A. That is correct.

Q. You say you do have a duplicate of that license in your office? A. Yes, sir.

Q. Is that also true of Exhibit 2?

A. Yes, sir, the same thing with that.

Mr. Pease: We offer in evidence plaintiff's Exhibits 1 and 2.

Mr. Acher: One moment. I should like to ask a question or two if I am permitted.

The Court: Proceed.

(Testimony of Charles H. Reed.)

Examination

By Mr. Acher:

Q. Showing you plaintiff's proposed Exhibit No. 2, you were asked the question as to when this document was filed, and you read January 15, 1946. Do you recall your testimony? [55]

A. I believe I did.

Q. Well if you will examine that, isn't it a fact that the date you read was the date that this is purportedly signed by someone, "Dated at Great Falls, Montana, this 15th day of January, 1946," isn't that correct? A. It seems to be.

Q. Isn't it a fact that there isn't a filing mark on this proposed Exhibit No. 2?

A. No, sir, I don't see it. May I explain about the date further on the records?

Q. I don't think it requires any explanation. When you brought plaintiff's proposed Exhibit No. 1 from your office, it was not in the same condition that it now is, in that there was annexed to it another paper, was there not?

A. Yes, the beer license.

Q. That was annexed as a part of your record?

A. Yes sir.

Q. Do you have that there? A. Yes, sir.

Q. And likewise, plaintiff's Exhibit 2 had annexed to it another paper which was fastened to it?

A. That's right.

Q. And it was that way in your office as an original record? A. Yes, sir.

(Testimony of Charles H. Reed.)

Mr. Acher: At this time we object to the introduction of [56] plaintiff's proposed Exhibits 1 and 2 upon the ground that there is no presumption that this document which bears a signature "L. P. De Pratu" was signed by the same person as the defendant here until such time as that matter has been connected up.

The Court: Let me see the exhibits. Well, what have you to say about that, Mr. Pease?

Mr. Pease: I wish to ask the witness one or two more questions, your Honor?

Direct Examination
(Resumed)

By Mr. Pease:

Q. What were you about to say, Mr. Reed, in answer to one of Mr. Acher's questions concerning the date?

The Court: Well, that is not proper because there is a date stamped on the face of this paper.

Mr. Pease: That's right.

The Court: It is stamped on the face of this paper, "Received January 28, 1946, Montana Liquor Control Board."

Mr. Acher: One has the stamp and the other does not.

The Court: One has the stamp and the other does not. That is plaintiff's Exhibit 1 that bears on its face the date of receipt by the Liquor Control Board. As to plaintiff's Exhibit 2 if there is anything on the exhibit that shows on its face it was

(Testimony of Charles H. Reed.)

received or filed by the Montana Liquor Control Board, he may read it. If there isn't, you may interrogate him as to what personal knowledge he has as to the date it was received.

Mr. Pease: He doesn't have any, your Honor, as to the date, [57] he wasn't there, but I would like to ask the witness if he can produce tomorrow the duplicate retail liquor license issued upon the application and upon each of these applications. Will you do so at the time Court convenes tomorrow morning, please?

The Witness: Yes.

Q. And do those show the date of issuance?

A. Yes, I presume they do.

Q. You are familiar with the form of license?

A. Yes, but I don't make the papers out myself.

The Court: Yes, but he has been administrator only since the first of the year. That isn't much time. He hasn't had much of an opportunity to become familiar with the forms of the Board. Well, there is an objection before the Court, Mr. Pease, what do you have to say about that?

Mr. Pease: Well I will withdraw the offer at this time until after the next witness is called, and I have no further questions of Mr. Reed at this time.

Mr. Acher: No cross-examination.

The Court: Very well, call your next witness.

(Witness excused.)

PAUL W. SMITH

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows: [58]

Direct Examination

By Mr. Pease:

Q. Please state your name.

A. Paul W. Smith.

Q. You are an attorney and counsellor by profession? A. I am.

Q. And have been for years? A. Yes.

Q. You live in Helena? A. I do.

Q. What, if any, official position do you now have with the State of Montana?

A. I am attorney for the Montana Liquor Control Board.

Q. How long a time have you been incumbent in that position?

A. I was employed as attorney in March, 1944.

Q. Have you occupied that position ever since?

A. I have.

Q. Were you such during the entire year of 1946? A. I was.

Q. I ask you to look at plaintiff's Exhibit 1 and plaintiff's Exhibit 2, particularly at the name of the applicant and the signature, and I will ask you did you have anything to do in your official capacity with the applications or with any licenses issued pursuant thereto? A. Yes, sir, I did.

Q. Do you know the defendant, Louis De Pratu?

A. Yes, sir, I do.

Q. Do you know who these applications were made by?

(Testimony of Paul W. Smith.)

A. By Mr. De Pratu, in the courtroom here.

Q. The defendant in this case? A. Yes.

Q. Were those signatures on the exhibits when they first came before the Montana Liquor Control Board? A. Yes, they were.

Q. Mr. Smith, can you state what is the procedure of showing or of making a record of the time of filing applications of this kind?

A. They are filed when the applications—the applications are filed when they are received by the Board.

Q. What record is made of the time of receipt?

A. Well, the mailing clerk is supposed to stamp the time of receipt. They do on some; I notice one here there is.

Q. You find on Exhibit 1 there is a reception stamp?

A. Yes, that is made by the mail clerk at the Board.

The Court: Are you sure it is Exhibit 1?

Mr. Pease: He looked at it.

Q. (By Mr. Pease): The other one does not bear a reception stamp? A. No.

Q. What record is there of the Board which will show the time of filing of that application? [60]

A. There is a record here of February 15, 1946, marked O.K. by J.A.B. J.A.B. is Mr J. A. Buley. He was the administrator. That was the time he okayed this application so that it was on file with the Board at that time.

(Testimony of Paul W. Smith.)

Q. It was already on file by the 15th of February of 1946? A. Yes.

Q. Is that correct? A. That's correct, yes.

Mr. Pease: We now re-offer the two exhibits, if the Court please. I believe we overcame the objection made.

Mr. Acher: At this time the only objection I have, your Honor, it appears from the evidence of the witness heretofore that this exhibit is not complete. In fact under the Montana laws you can't get a retail liquor license until you do have a beer license, and, therefore, we submit the whole application should be offered. We will withdraw the objection if that is done.

The Court: Well, I feel that the District Attorney, in presenting his case, may offer such part of the official record as it appears to him is material in the prosecution of his case. His indictment charges a liquor license, and that ordinarily doesn't contemplate—the retail liquor license does not ordinarily contemplate, as I believe in common parlance, beer, so your objection to the introduction of the exhibits is overruled. However, the District Attorney is directed to make available [61] to you the portions of the record that you assert was removed from the exhibit as finally offered for your inspection and the inspection of your client, so that if you feel there is any particular part of that material to your client's case, or this defendant's case,

(Testimony of Paul W. Smith.)

you may have an opportunity then to offer it. Proceed. You will do that Mr. Pease, you will make that available to the defendant.

Mr. Pease: I will ask Mr. Reed to bring those beer licenses back tomorrow, or make them available right now.

The Court: We won't interrupt the trial. Make them available after five o'clock.

Mr. Pease: The applications are admitted?

The Court: They are admitted in evidence. The objection is overruled and they are admitted in evidence.

(Plaintiff's Exhibit 1, being an application to the Montana Liquor Control Board for a Retail Liquor License by L. P. De Pratu, dated the 27th day of June, 1946, and Plaintiff's Exhibit 2, being an application to the Montana Liquor Control Board for a Retail Liquor License by L. P. De Pratu, dated the 15th day of January, 1946, were here received in evidence and read to the jury. The same will be certified to the Circuit Court of Appeals by the Clerk.)

Pltf's Ex 1 (Admitted)

Form 7-3—4M—4-46

(County in which license is to be used)

FEE $ .....

FISCAL YEAR
1946
July 1, 1946 to June 30, 1947

Montana Liquor Control Board
HELENA, MONTANA

(DO NOT USE THIS SPACE)
Cash Item No.
Beer License R. No. 1170
Liquor License R. No.

Application for Retail Liquor License

Application must be completely filled out and sworn to before a Notary Public or other person authorized to administer oaths. The statutory fee must accompany this application and will be returned if the license is denied. This Board has thirty days in which to consider this application and the applicant must refrain from possessing or selling intoxicating liquor until in possession of the license applied for. All applicants must have a beer license, and no license shall be effective until a permit shall have been first secured under the laws of the United States if such a permit is necessary or is required under such law. If any false statement is made in any part of this application, the applicant, or applicants, shall be deemed guilty of a misdemeanor and upon conviction thereof, the license, if issued, shall be revoked and the applicant subjected to the penalties provided by law.

L. P. LE PRATU
(Full names of all applicants for this license. Please print or type.)

THE STOCKADE
(Trade name which applicant, or applicants, intend to call such business.)

619 - 3d Street N. W. Great Falls, Mont.
(Location by street and number and city or town of the premises where the business is to be carried on under the license, if issued.)

REMITTANCES MUST BE BY BANK DRAFT, MONEY ORDER OR EXPRESS ORDER. PERSONAL CHECKS WILL NOT BE ACCEPTED.

TO MONTANA LIQUOR CONTROL BOARD:

I hereby apply for a Retail Liquor License and under oath make the following statements and answer the following questions, to-wit:

(1) State in what capacity you make this application:
President & Manager
(State whether owner, partner, or if corporation, state your office, or in any other capacity.)

(2) If a partnership, or other joint venture, give the names of all interested parties. .....

(3) Are you over the age of twenty-one years? Yes

(4) Are you a citizen of the United States? Yes

(5) Have you been a citizen of the state of Montana for five years? Yes If corporation, has corporation been organized and doing business in Montana for five years? No

(6) Are you a keeper of a house of ill fame? No

(7) Have you ever been convicted of being the keeper of a house of ill fame? No

(8) Have you ever been convicted, either under the laws of the federal government or the state of Montana, of pandering or other crime or misdemeanor opposed to decency and morality? No

(9) Have you or any one employed by you ever been convicted for violation of any law or ordinance relative to sale of beer or liquor? No

(10) If you answered "yes" to the preceding question, state the particular offense, date, court and place of conviction: .....

(11) Has any license to sell liquor at retail, issued under the Act by virtue of which this license is applied for, issued to you, or in which you were interested as a partner or otherwise, ever been revoked? No

(12) Has the undersigned, under separate application, applied for, or been issued, a beer license under the laws of Montana for the calendar year for which this license is applied for? No

(13) Has any other liquor license been issued to you this fiscal year? No

(14) Are you interested in any other liquor license other than the one for which this application is made? No

(15) Are the premises for which such license is sought inside the boundaries of an incorporated city or town? Yes

(16) If the premises for which license is sought are not in a city or town, are the same within a distance of five (5) miles of a city or town with a population of two thousand (2,000) or more, measured in a straight line from the nearest entrance of such premises to the nearest boundary of such city? .....

(17) Are the premises above specified, for which the license is applied, on the same street or avenue and within 600 feet of a building occupied exclusively as a church, synagogue or other place of worship, or school (except a commercially operated school); the measurements to be taken in a straight line from the center of the nearest entrance of such school, church, synagogue or other place of worship to the center of the nearest entrance of the premises for which the license is applied? No

(18) If you have answered "yes" to the last preceding question, state whether the premises for which the license is applied are maintained as a bona fide hotel, restaurant, railway car, club or fraternal organization or society, or similar place of business, established and in actual operation for one year prior to March 5, 1937? No

(19) If the business to be licensed is outside of an incorporated city or town, what other businesses are operated by applicant or those interested or about to be interested in the business to be licensed, such as other bars, dance halls, tourist camps, rooming houses and places of like resort?

(20) That the Board or any member thereof, or its duly authorized representative, or any peace officer of this state shall have the right at any time, and is hereby given the authority to make an examination of the premises of the undersigned and to check the books, records and stock in trade of the undersigned and to take an inventory thereof and in the event any liquor is found which is being kept or held in violation of the law, he may immediately sieze and remove the same;

(21) That the undersigned, or his or her employee or employees, will not sell, deliver or give away, or cause or permit to be sold, delivered or given away, any liquor, beer or wine to any person under the age of 21 years, or to any intoxicated person or any person actually, apparently or obviously intoxicated, or to an habitual drunkard, or to any interdicted person; and,

(22) That if the undersigned is granted the license applied for, the undersigned will abide by all rules and regulations of the Board relating to beer or intoxicating liquor, and will not violate any law of the United States, or of the State of Montana, or any legal city ordinance relating to beer or intoxicating liquor, and will not knowingly permit any agent or employees so to do, it being the express understanding that violation of any rule or regulation of said Board, or of any law of the United States, or of the State of Montana, or of any city ordinance relating to beer or intoxicating liquor by the undersigned, or any of them, or by any agent or employee of the undersigned, shall be sufficient grounds for the revocation or suspension of the license herein applied for.

Dated at Great Falls, Montana, this 27th day of June, 1946

L. P. DeBrato

(Signature of All Applicants)

STATE OF MONTANA,
COUNTY OF Cascade } ss.

L. P. DE PRATU
(Names of All Applicants)

being first duly sworn, each for himself, or herself, deposes and says: that he, or she, has read the foregoing application and knows the contents thereof; and that the same is true to the knowledge of the deponent.

L. P. DeBrato

(Signature of All Applicants)

Subscribed and sworn to before me this 27th day of June, 1946

Wm Mourt

Notary Public for the State of Montana.

Residing at Great Falls, Montana.

My Commission expires 9/15/48

LICENSE FEES—

In cities over 10,000 population or within five miles thereof	$600.00
Less than 10,000 and more than 5,000 or within five miles thereof	450.00
Less than 5,000 and more than 2,000 or within five miles thereof	300.00
Less than 2,000	200.00

In determining the population the Board will be governed by the last census in effect at the time of the application

MAKE SEPARATE REMITTANCE FOR EACH APPLICATION

1,500—3-45.

Cascade
(County in which license is to be used.)

FEE $ 600.00

FISCAL YEAR
1945
July 1, 1945 to June 30, 1946

Montana Liquor Control Board
HELENA, MONTANA

(DO NOT USE THIS SPACE)
Cash Item No.
Beer License R. No.
Liquor License R. No. 1098

Application for Retail Liquor License

Application must be completely filled out and sworn to before a Notary Public or other person authorized to administer oaths. The statutory fee must accompany this application and will be returned if the license is denied. This Board has thirty days in which to consider this application and the applicant must refrain from possessing or selling intoxicating liquor until in possession of the license applied for. All applicants must have a beer license, and no license shall be effective until a permit shall have been first secured under the laws of the United States if such a permit is necessary or is required under such law. If any false statement is made in any part of this application, the applicant, or applicants, shall be deemed guilty of a misdemeanor and upon conviction thereof, the license, if issued, shall be revoked and the applicant subjected to the penalties provided by law.

L. P. DePratu
(Full names of all applicants for this license. Please print or type.)

The Stockman's Club
(Trade name which applicant, or applicants, intend to call such business.)

619 - 2nd Street Northwest, Great Falls, Montana
(Location by street and number and city or town of the premises where the business is to be carried on under the license, if issued.)

TO MONTANA LIQUOR CONTROL BOARD:

I hereby apply for a Retail Liquor License and under oath make the following statements and answer the following questions, to-wit:

(1) State in what capacity you make this application:
President and Manager
(State whether owner, partner, or if corporation, state your office, or in any other capacity.)

(2) If a partnership, or other joint venture, give the names of all interested parties.

(3) Are you over the age of twenty-one years? Yes

(4) Are you a citizen of the United States? Yes

(5) Have you been a citizen of the state of Montana for five years? Yes

(6) Are you a keeper of a house of ill fame? No

(7) Have you ever been convicted of being the keeper of a house of ill fame? No

(8) Have you ever been convicted, either under the laws of the federal government or the state of Montana, of pandering or other crime or misdemeanor opposed to decency and morality? No

(9) If you answered "yes" to the preceding question, state the particular offense, date, court and place of conviction:

(10) Has any license to sell liquor at retail, issued under the Act by virtue of which this license is applied for, issued to you, or in which you were interested as a partner or otherwise, ever been revoked? No

(11) Has the undersigned, under separate application, applied for, or been issued, a beer license under the laws of Montana for the calendar year for which this license is applied for? Yes

(12) Has any other liquor license been issued to you this fiscal year? No

(13) Are you interested in any other liquor license other than the one for which this application is made? No

(14) Are the premises for which such license is sought inside the boundaries of an incorporated city or town? Yes

(15) If the premises for which license is sought are not in a city or town, are the same within a distance of five (5) miles of a city or town with a population of two thousand (2,000) or more, measured in a straight line from the nearest entrance of such premises to the nearest boundary of such city?

(16) Are the premises above specified, for which the license is applied, on the same street or avenue and within 600 feet of a building occupied exclusively as a church, synagogue or other place of worship, or school (except a commercially operated school); the measurements to be taken in a straight line from the center of the nearest entrance of such school, church, synagogue or other place of worship to the center of the nearest entrance of the premises for which the license is applied? No

OK 2/15/46

(17) If you have answered "yes" to the last preceding question, state whether the premises for which the license is applied are maintained as a bona fide hotel, restaurant, railway car, club or fraternal organization or society, or similar place of business, established and in actual operation for one year prior to March 5, 1937?.....

(18) If the business to be licensed is outside of an incorporated city or town, what other businesses are operated by applicant or those interested or about to be interested in the business to be licensed, such as other bars, dance halls, tourist camps, rooming houses and places of like resort? .....

.....

(19) That the Board or any member thereof, or its duly authorized representative, or any peace officer of this state shall have the right at any time, and is hereby given the authority to make an examination of the premises of the undersigned and to check the books, records and stock in trade of the undersigned and to take an inventory thereof and in the event any liquor is found which is being kept or held in violation of the law, he may immediately sieze and remove the same;

(20) That the undersigned, or his or her employee or employees, will not sell, deliver or give away, or cause or permit to be sold, delivered or given away, any liquor, beer or wine to any person under the age of 21 years, or to any intoxicated person or any person actually, apparently or obviously intoxicated, or to an habitual drunkard, or to any interdicted person; and,

(21) That if the undersigned is granted the license applied for, the undersigned will abide by all rules and regulations of the Board relating to beer or intoxicating liquor, and will not violate any law of the United States, or of the State of Montana, or any legal city ordinance relating to beer or intoxicating liquor, and will not knowingly permit any agent or employees so to do, it being the express understanding that violation of any rule or regulation of said Board, or of any law of the United States, or of the State of Montana, or of any city ordinance relating to beer or intoxicating liquor by the undersigned, or any of them, or by any agent or employee of the undersigned, shall be sufficient grounds for the revocation or suspension of the license herein applied for.

Dated at Great Falls, Montana, this 15th day of January, 1946

L. P. DePratu

.....

.....
(Signatures of All Applicants)

STATE OF MONTANA,
COUNTY OF Cascade } ss.

L. P. DePratu
(Names of All Applicants)

being first duly sworn, each for himself, or herself, deposes and says: that he, or she, has read the foregoing application and knows the contents thereof; and that the same is true to the knowledge of the deponent.

L. P. DePratu

.....

.....
(Signatures of All Applicants)

Subscribed and sworn to before me this 15th day of January, 1946

D. O'Neil
Notary Public for the State of Montana.

Residing at Great Falls, Montana.

My Commission expires Oct. 20, 1946

LICENSE FEES—

In cities over 10,000 population or within five miles thereof	$600.00
Less than 10,000 and more than 5,000 or within five miles thereof	450.00
Less than 5,000 and more than 2,000 or within five miles thereof	300.00
Less than 2,000	200.00

In determining the population the Board will be governed by the last census in effect at the time of the application.

(Testimony of Paul W. Smith.)

Mr. Pease: You may cross-examine.

Cross-Examination

By Mr. Acher:

Mr. Acher: If the Court please, I would like to call attention—I don't know whether I am permitted to discuss that—the first question Mr. Pease didn't read to you, "State in what capacity you make this application" and then there is a line with the words typed in "President and Manager," and under the line it says "State whether owner, partner, or if corporation, state your office, or in any other capacity."

Mr. Pease: I did read that in the first application, it is the same in both.

Mr. Acher: You did in the first, but in the second you omitted it.

Mr. Pease: I didn't repeat.

Q. (By Mr. Acher): You have some acquaintanceship with the original application and the second application, that is, Exhibit 1 and Exhibit 2. in this case, do you not? A. Yes.

Q. Now, isn't it a fact that before the liquor license, which is plaintiff's Exhibit 1, could be issued that there has to be issued a beer license, and that it was annexed as part of your file in your office?

A. That's correct.

Q. And you had to do with this particular application personally, so you know about it?

A. Yes, it was submitted to me because of the Stockman's Club.

(Testimony of Paul W. Smith.)

Q. I cannot now—could I ask Mr. Reed, inasmuch as Mr. Smith can identify it, to have it presented at this time?

The Court: If Mr. Reed has it in his possession, and you desire [63] to get it from him, you may take time to get it, if you want.

Q. Showing you the Government's Exhibit No. 1, could you identify now the particular paper here that would fit that. It was taken off here in the presence of the jury a little while ago.

A. Yes.

Q. Showing you an exhibit which has been identified as defendant's Exhibit 3, Mr. Smith, I will ask you whether or not that application for a retail beer license was issued simultaneously with and as a condition precedent to—I mean the application was considered simultaneously with plaintiff's Exhibit 1, and that any license issued under Exhibit 1 first had to have a license issued under this application?

Mr. Pease: I think I will object to that question, your Honor, in part as it is not the best evidence in the case, the best evidence being a record, and in the second place, he is really asking Mr. Smith as to what the law provides.

The Court: That is true. The statute of Montana provides that a retail liquor license shall not be issued unless a beer license has been issued.

The Witness: Yes.

The Court: If that is the law, why ask the witness?

(Testimony of Paul W. Smith.)

Mr. Acher: I offer defendant's Exhibit 3 as part of the same application, intermingled with it. They couldn't get one without the other; and they are all one application. [64]

Mr. Pease: I would like to ask a question as a foundation.

Examination

By Mr. Pease:

Q. Mr. Smith, the two exhibits, the retail liquor application and the beer application, were stapled together by a wire staple when produced here in court, were they not? A. Yes, that is correct.

Q. Will you state whether they are considered as a single instrument, or were they stapled for convenience?

A. It is done for convenience in the office so it will be on top, be together.

Q. Is the beer application considered a part of the liquor application?

A. No, except they have to have a beer license before they can get a liquor license.

Mr. Pease: I think I will object to it on the ground I think it is an encumbrance of the record and is shown to be no part of the retail liquor license application.

The Court: Let me see it.

Mr. Acher: I think here is Exhibit 1 that goes with it, your Honor.

The Court: Well, ladies and gentlemen of the jury, there is a question of law which is to be submitted to me now that will probably take some little time.

(Jury excused until 10:00 o'clock, January 8, 1947, and retired from the courtroom.) [65]

The Court: Well, on what theory do you believe this is material, Mr. Acher, defendant's Exhibit 3 admissible in evidence at this time?

Mr. Acher: It shows on its face, your Honor, that this application was not necessarily for the defendant, but for a corporation. I expect to supplement that by further evidence. I think I can tell your Honor our theory of this case is this: we expect to show that there was a corporation formed called the Stockman's Club; that this application was made, theoretically for the club so far as our client was concerned. They had a rule that a non-profit club had to be in existence for so long a time under the staute before that was allowable, and so a license was issued to the man individually, but as appears from the statements on plaintiff's Exhibit 1, it is a debatable question whether it means he was a citizen or whether the club is a citizen.

The Court: Isn't that a part of your defense, then?

Mr. Acher: I think, your Honor, when a document is introduced in evidence, I thought the rule was I could introduce the rest of it in evidence. My contention is that the two documents are one and I can introduce the rest of it.

The Court: That may be the rule, but they are two separate and distinct applications as I see it, neither one relating to the other, one an application for a retail liquor license, and the other an application for a beer license. They may have both [66]

been signed at the same time; they may both have been submitted to the State Board of Equalization at the same time but, in my opinion, that does not make them one instrument. It doesn't make two of them one instrument. They are two separate pieces of paper, they were separately executed; there are questions that are put in one that are not put in the other. The rule, very true, is that when a portion of a writing is offered in evidence, that then the other party has the right to offer the other portion.

Mr. Acher: That is my contention.

The Court: But this is more than one writing. These are two separate and distinct writings, and the rule, as I view the rule—you are offering here one an application for a retail beer license, and the other an application for retail liquor license.

Mr. Acher: Your Honor will note up in the corner of plaintiff's Exhibit 1, "Beer License Issued."

The Court: That's right, and on this I note here that on this application for retail beer license, the number is on there, and I note also that on the application for retail beer license that the liquor license number is on there, too, but that, in my opinion, does not make it one paper, document, or instrument. They are still, as I see it, two separate and distinct papers. In other words, he was applying for two of these things: he was applying to the State Board to be permitted to sell two different articles [67] in his place of business. He was re-

quired to have licenses to sell each of them. Now, beer, as I view it, isn't a liquor, it is beer, it is not at all the same——(interrupted)

Mr. Acher: But he couldn't get a liquor license without a beer license.

The Court: That may be very true. The State may require as a condition precedent to licensing a man to sell whiskey that he also be licensed to sell beer, but that still doesn't make beer whiskey or whiskey beer, and as I view it at this time, they are two different and distinct instruments. The indictment charges that he made a false statement in a retail liquor license, in his application for a retail liquor license. That is the matter before the jury, and it makes no difference, as I view it, if he made a false statement in a retail liquor license, whether he made a true statement in his application for a retail beer license, and that seems to me to be your contention. If that is your contention, it seems to me it is matter to prove in your case in chief if that is your defense as you say it is. I will sustain the objection to that offer.

Mr. Acher: I will take it it isn't with prejudice to the right to renew it later?

The Court: No. Sustained on the ground it is part of your case in chief, if you desire.

(Whereupon an adjournment was taken until Thursday, January 8, 1948, at 10:00 o'clock a.m., at which time the following proceedings were had in the presence of the jury.) [68]

PAUL W. SMITH

witness for the plaintiff, resumed the witness stand for

Further Cross-Examination

By Mr. Acher:

Q. At the conclusion of yesterday's session, Mr. Smith, you had identified a document as defendant's proposed Exhibit 3, which I believe you identified as having been submitted at the same time as plaintiff's Exhibit 1? A. Yes.

Q. I now show you a document which has been marked for identification as defendant's Exhibit 4, and ask you to identify that.

A. That is the application for retail beer license.

Q. And I will ask you whether or not that was submitted at the same time as the application for retail liquor license which is in evidence as plaintiff's Exhibit 2? A. Yes, it was.

Q. In your direct examination, Mr. Smith, you testified that—the question was asked, "I ask you to look at plaintiff's Exhibit 1 and plaintiff's Exhibit 2, particularly at the name of the applicant and the signature, and I will ask you did you have anything to do in your official capacity with the applications or with any license issued pursuant thereto," and your answer was "Yes, sir, I did." I will ask you, Mr. Smith, whether or not, is it not a fact that plaintiff's Exhibit 2 was referred to you in your official capacity shortly prior to February 16, 1946, by Mr. Buley, the administrator for the Montana Liquor Control [69] Board, for an

(Testimony of Paul W. Smith.)

opinion as to whether or not a license could be issued to the Stockman's Club?

Mr. Pease: If the Court please, the Government objects on the ground that the matter appears to be irrelevant to the issues of the cause.

The Court: Sustained.

Mr. Acher: Could we make a written offer of proof, your Honor?

The Court: Very well.

Defendant's Offer of Proof No. 1

The defense offers to prove by the witness on the stand that he would have answered the question to which objection has been made in the affirmative.

Mr. Pease: The Government objects to the offer of proof, first, on the ground that the matter is irrelevant, second, on the ground it is improper cross-examination and a part of the defendant's case in chief.

The Court: Well, the offer of proof will be filed as defendant's offer of proof No. 1 by the Clerk and the objection will be sustained.

Mr. Acher: If your Honor please, do I have the right to ask questions on this subject, or should I confine myself to written offers of proof? I don't want to be in contempt, I want to proceed properly.

The Court: If you desire to make a record, propound the questions [70] orally and see if the questions are objected to and whether or not they will be sustained on it and then make your offer of proof.

(Testimony of Paul W. Smith.)

Q. Showing you plaintiff's Exhibit 2—this may be repetition but I am afraid it is in the last question—state whether or not this exhibit was presented to you shortly prior to February 15, 1946?

A. Yes, it was.

Q. And what action did you take in your official capacity upon the application when it was submitted to you?

Mr. Pease: Just a moment, if the Court please, I would like an opportunity to ask a foundation question at this point.

The Court: Well, I don't know. A foundation for what?

Mr. Pease: I want to clarify the character of the official capacity, your Honor.

The Court: No. This is cross-examination. The witness has testified on your direct examination as to the authority of the position he held with the Montana Liquor Control Board.

Mr. Pease: I appreciate that. I will object to the question on the ground that the same is not proper cross-examination and part of the defense of the case, and the same is irrelevant to the issues of the case.

The Court: Well, I think I will overrule that one objection. It is not asking the witness to relate anything he said; it is simply asking him what he did. It will be overruled. Simply [71] answer the question.

A. I gave an opinion as to the Stockman's Club holding a liquor license..

(Testimony of Paul W. Smith.)

Q. And what was that opinion?

Mr. Pease: Objected to on the same grounds as the last objection.

The Court: Sustained.

Q. In giving that opinion, did you treat plaintiff's Exhibit 2 as an application by L. P. De Pratu or as an application by the Stockman's Club?

Mr. Pease: Object to that, if the Court please, on the ground stated in the last objection and also as calling for an opinion, apparently as calling for a matter which apparently is a matter of record, the record being the best evidence.

Mr. Acher: If the Court please, I would just like to call attention that this is cross-examination. On direct examination he was asked, "Did you have anything to do in your official capacity with the applications or with any licenses issued pursuant thereto?" He said, "Yes, sir." On cross, without objection, the question was, "You had to do with this particular application personally so you know about it?" and the answer was, "Yes, it was submitted to me because of the Stockman's Club." It is in without objection.

The Court: That is true. What goes in without objection on cross-examination, as I view it, doesn't enlarge the scope of [72] cross-examination. The scope of the cross-examination is either enlarged or limited by the questions asked by the counsel on his direct examination, and it is true he was asked if he had something to do with it, but it seems to me at the time he was asked more as the laying

(Testimony of Paul W. Smith.)

of a foundation as to whether or not he knew the person who signed the instrument than as to its contents. It makes no difference how this witness viewed the application, the application is in writing and speaks for itself as to who the application was made by and who it was made for. Asking him what he considered it is improper cross-examination, an invasion of the province of the jury in asking him to construe a record. The objection will be sustained.

Defendant's Offer of Proof No. 2

The defense offers to prove by the witness on the stand that he treated the application as that made by the Stockman's Club.

Mr. Pease: Objected to on the same grounds as stated in the last previous objection, particularly that the matter which is the subject of the offer is a matter of record, that the answer, if given, would not be the best evidence for that reason, and that the same is no part of the proper cross-examination of this witness, and if proper at all would be matter to be offered as part of the defense in the case.

The Court: The offer will be filed as defendant's offer of proof No. 2, and the objection will be sustained. [73]

Q. Is it not a fact, Mr. Smith, that you advised Mr. Buley that the application could not be granted to the Stockman's Club because they had not been in existence as a club for a sufficient length of time and that——(interrupted)

(Testimony of Paul W. Smith.)

Mr. Pease: The question is objected to on the same grounds as stated in the objection to the last preceding offer of proof on the part of the defendant.

The Court: Objection is sustained. It is hearsay also.

Defendant's Offer of Proof No. 3

The defendant offers to prove that the witness would have answered the question in the affirmative.

Mr. Pease: To the defendant's offer of proof 3, the government objects on the same grounds as stated to the last question on cross-examination.

The Court: The offer of proof will be filed and the objection will be sustained.

Q. Did you, Mr. Smith, in considering plaintiff's Exhibit 2, the application for retail liquor license, have occasion at any time to talk to Mr. De Pratu?

Mr. Pease: If the Court please, I don't know where this is leading, but I will object to it on the ground that a conversation is apparently not an official matter, not a matter of official action, and that whatever might have transpired in such conversation could not constitute material matter upon the issues in this case. Further that if proper at any [74] point, it would be in the defendant's case in chief, not upon cross-examination.

Mr. Acher: I will reframe the question. Isn't it a fact, Mr. Smith, that you did not have any dealings with Mr. De Pratu as an applicant, but that

(Testimony of Paul W. Smith.)

you did have dealings with a representative of his, an attorney at law, Sherman W. Smith.

Mr. Pease: I will object to that as improper cross-examination, your Honor.

The Court: Yes, the objection will be sustained.

Defendant's Offer of Proof No. 4

We offer to prove that the witness would have answered the question yes.

Mr. Pease: To the offer of proof numbered 4, the government objects on the same ground as given to the offer of proof numbered 3.

The Court: It will be filed. The objection is sustained.

Q. Is it not a fact, Mr. Smith, that in considering whether or not a license should be issued under plaintiff's Exhibit 2, the decision of the Liquor Control Board was based upon your advice?

Mr. Pease: This is objected to on the same grounds as made to this entire line of cross-examination, that the matter is improper cross-examination and is irrelevant to the issues of the case, or if relevant at all is part of the defense of the case.

The Court: Yes, sustained.

Q. Is it not a fact, Mr. Smith, that the citizenship of Mr. L. P. De Pratu as an individual was not considered in connection with plaintiff's Exhibit 2 when you gave your decision as to the application?

Mr. Pease: Objected to on the ground that it would be not the best evidence, it would be a matter

(Testimony of Paul W. Smith.)

of record; it is improper cross-examination; if relevant at all, it is part of the defense in the case, and isn't relevant as such.

The Court: It is entirely immaterial whether it was or was not considered by the board. It is a matter extraneous to this case. The question here before the jury, and the only question here is whether or not the defendant represented himself to be a citizen as set out in the indictment, and whether or not, if he did, that representation is true. That is the charge and that is the question here. The objection will be sustained.

Defendant's Offer of Proof No. 5

Defendant offers to prove that the witness would have answered yes.

Mr. Pease: The government objects to the offer of proof numbered 5 on the same grounds as stated in the last objection, the objection to the last question.

The Court: The offer of proof will be filed, and the objection will be sustained.

Q. Showing you plaintiff's Exhibit 2, the application for [76] retail liquor license dated January 15, 1946, and defendant's proposed Exhibit 4, which you identified yesterday, I will ask you whether or not in your consideration of those applications it was all a part of the same transaction?

Mr. Pease: Objected to on the ground it is not the best evidence.

The Court: Yes, and calling for a conclusion of the witness. Sustained.

(Testimony of Paul W. Smith.)

Q. Were both papers considered simultaneously?

Mr. Pease: Objected to as repetition, also as not the best evidence.

The Court: I am going to overrule the objection to this particular question because I think it is completely harmless whether they were or whether they weren't. To me the gist of the offense, if an offense was committed—if there was any offense committed at all, it was committed when the application was filed. What happened to the application afterwards, what the Board did with with it afterwards, what this witness as an official of the State of Montana did with it afterwards is a matter of no moment at all. I am going to overrule the objection.

A. Yes.

Mr. Acher: In view of the answer, your Honor, I would like to renew my offer of plaintiff's Exhibit 4. I have some authorities I would like to submit; I have some authorities and will [77] give a copy to the District Attorney.

The Court: Do you have any objection to the offer, Mr. Pease?

Mr. Pease: Yes, I have the same objection as made yesterday that the record in the case and the record in the board itself shows that this is not the same transaction.

The Court: Well, the objection is going to be sustained as not proper cross-examination. As to the application, the charge in the indictment relates to a retail liquor license, which is not a beer license at all.

Mr. Acher: That's all.

Mr. Pease: That is all, Mr. Smith. If the Court please, and counsel, Mr. Reed, the administrator has requested that he may be excused and I expect Mr. Smith would like to go also, and I would like to have these gentlemen excused temporarily subject to call. Mr. Acher might want them back, I don't know.

(Witness excused.)

The Court: Very well. Call your next witness.

Mr. Pease: The government offers in evidence plaintiff's Exhibit No. 5.

The Court: Is there any objection to the offer?

Mr. Acher: Yes, your Honor. Our only objection, your Honor, is upon the ground that the same is incompetent as evidence to prove that the defendant is not a citizen and upon the further ground it would not be admissible as an admission until the corpus delicti has first been shown by competent evidence.

The Court: Objection will be overruled, the exhibit will be [78] admitted.

(Plaintiff's Exhibit 5, being a certified copy of Alien Registration Form signed by Louis Raphael De Pratu and bearing date stamp, "Great Falls, Mont., Nov. 16, 1940," was here received in evidence and read to the jury. The same will be certified to the Circuit Court of Appeals by the Clerk.)

Form G-84
(Revision of 8-15-43)

#6747 - US v Louis R. DePratu

Ex 5 (admitted)

95

United States of America

DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

January 16, 194_

PURSUANT to Title 28, Section 661, U. S. Code (Sec. 882, Revised Statutes), I HEREBY CERTIFY that the annexed document is a true copy of the original contained in the record of the Immigration and Naturalization Service, Department of Justice, relating to Louis Raphael De Pratu, file No. A-5289642.

IN WITNESS WHEREOF I have hereunto set my ha
and caused the seal of the Department of Justi
Immigration and Naturalization Service, to
affixed, on the day and year first above writte

[SEAL]

Joseph Savoretti
Assistant Commissioner,
Immigration and Naturalization Servi

U. S. GOVERNMENT PRINTING OFFICE 548784

LNS/fc

EXHIBIT #

97

5285042

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

ALIEN REGISTRATION FORM

(OFFICE USE)

(a) My name is Louis (FIRST NAME) Raphael (MIDDLE NAME) Delratu (LAST NAME)

(b) I entered the United States under the name of Louis Raphael Delratu

(c) I have also been known by the following names "Fatty" nickname
(include maiden name if a married woman, professional names, nicknames, and aliases):

(a) I live at Wolf Langman Livestock Co. (STREET ADDRESS OR RURAL ROUTE) Great Falls (CITY) Cascade (COUNTY) Mont. (STATE)

(b) My post-office address is P.O. Box 884 (POST OFFICE) Great Falls, Mont. (STATE)

(a) I was born on October (MONTH) 21 (DAY) 1878 (YEAR)

(b) I was born in (or near) Alexandera (CITY) Ontario (PROVINCE) Canada (COUNTRY)

I am a citizen or subject of Uncertain, but last of Canada (COUNTRY)

(a) I am a (*check one*): Male...[X]1 Female...[ ]2

☆(b) My marital status is (*check one*): Single...[ ]1 Married...[ ]2 Widowed...[ ]3 Divorced [X]4

(c) My race is (*check one*): White...[X]1 Negro...[ ]2 Japanese...[ ]3 Chinese...[ ]4 Other

I am 5 feet, 4½ inches in height, weigh 142 pounds, have Gray (COLOR) hair and Brown (COLOR) eyes.

(a) I last arrived in the United States at Sault St. Marie, Mich. (PORT OR PLACE OF ENTRY) on Aug.15,1896 (MONTH, DAY, AND YEAR)

(b) I came in by Train (NAME OF VESSEL, STEAMSHIP COMPANY, OR OTHER MEANS OF TRANSPORTATION)

(c) I came as a (*check one*): Passenger...[X]1 Crew member...[ ]2 Stowaway...[ ]3 Other

(d) I entered the United States as a (*check one*): Permanent resident...[X]1 Visitor...[ ]2 Student...[ ]3 Treaty merchant...[ ]4 Seaman...[ ]5 Official of a foreign government...[ ]6 Employee of a foreign government official...[ ]7 Other

(e) I first arrived in the United States on August (MONTH) 15 (DAY) 1896 (YEAR)

(a) I have lived in the United States a total of 43 years.

(b) I expect to remain in the United States Permanently (FOR INDEFINITELY, OR DURATION OF PERMITTED STAY)

(a) My usual occupation is Rest runt (b) My present occupation is Restwarant

(c) My employer (or registering parent or guardian) is self (NAME)

whose address is (STREET ADDRESS OR RURAL ROUTE) (CITY) (STATE)

and whose business is

All items must be answered by persons 14 years of age, or older. For children under 14 years of age, only the items marked with * (b) must be answered by the parent or guardian. All answers must be accurate and complete.

10. I am, or have been within the past 5 years, or intend to be engaged in the following activities:
In addition to other information, list memberships or activities in clubs, organizations, or societies

None

11. My military or naval service has been None
(COUNTRY)
(BRANCH OR GROUP OF SERVICE) From (DATE) to (DATE)

12. ☆I have not (HAVE, HAVE NOT) applied for first citizenship papers in the United States. Date of application

First citizenship papers received (DATE) (NUMBER) (CITY) (STATE)

Filed petition for naturalization (DATE) (CITY) (STATE)

13. ☆I have the following specified relatives living in the United States:

Parent(s) None (NONE, OR ONE, OR BOTH) Husband or wife No (YES OR NO) Children 3 (NUMBER)

14. I have (HAVE, HAVE NOT) been arrested or indicted for, or convicted of any offense (or offenses). These offenses are

Nature of offense	Date of arrest	Place of arrest	Disposition of case
Bootlegging	about 1925	Great Falls	Case dismissed

15. Within the past 5 years I have not (HAVE, HAVE NOT) been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government.

AFFIDAVIT FOR PERSONS 14 YEARS OF AGE AND OLDER

I have read or have had read to me the above statements, and do hereby swear (or affirm) that these statements are true and complete to the best of my knowledge and belief.

Subscribed and sworn to (or affirmed) before me at the place and on the date here designated by the official post-office stamp below.

Louis Raphael DePratu
(SIGNATURE OF REGISTRANT)

(REGISTERING OFFICIAL)

AFFIDAVIT FOR PARENT OR GUARDIAN ONLY

I am the
(PARENT OF, OR GUARDIAN OF, OR PERSON RESPONSIBLE FOR)

the above-named alien, who is
(UNDER 14 YEARS OF AGE OR INSANE)
and have made the above allegations for him (or her). I have read or have had the same read to me, and do hereby swear (or affirm) that they are true and complete to the best of my knowledge, information, and belief.

(SIGNATURE OF PARENT OF OR GUARDIAN OF, OR PERSON RESPONSIBLE FOR THE ALIEN)

PRINT NAME, ADDRESS, AND BUSINESS OF PERSON SIGNING THIS AFFIDAVIT IN 9(c), ABOVE.

Subscribed and sworn to (or affirmed) before me at the place and on the date here designated by the official post office stamp at the right.

(REGISTERING OFFICIAL)

16—16468 GPO

Mr. Pease: The government now offers in evidence exhibit No. 6.

Mr. Davidson: If the Court please, the defendant objects to the introduction of plaintiff's exhibit 6 on the ground it is not properly authenticated and on the ground it is negative testimony.

Mr. Acher: And on the further ground there is no showing, assuming such records have to be kept, they were kept in conformity with the law. [79]

* * * * * *

PLAINTIFF'S EXHIBIT No. 6
(Admitted)

United States of America, Department of Justice,
Immigration and Naturalization Service

April 10, 1947.

Pursuant to Title 28, Section 661, U. S. Code (Sec. 882, Revised Statutes), I Hereby Certify that the annexed document is an original recorded statement of the Immigration and Naturalization Service, United States Department of Justice, signed by Henry Colarelli, Chief of the Information, Mails and Files Section, of the Central Office, and by T. B. Shoemaker, Acting Commissioner of Immigration and Naturalization.

In Witness Whereof I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first above written.

[Seal] /s/ L. PAUL WINNINGS,
General Counsel,
Immigration and
Naturalization Service.

April 10, 1947.

CERTIFICATE OF NON-EXISTENCE OF NATURALIZATION RECORD

I, Henry Colarelli, hereby certify to the following:

1. That I am Chief of the Information, Mail and Files Section, Office of Administrative Services, of the Central Office, Immigration and Naturalization Service, United States Department of Justice, and by virtue of such position and the authority thereof, that I am custodian of all records of the Central Office of the United States Immigration and Naturalization Service, including any and all naturalization records required to be filed with the Commissioner of Immigration and Naturalization pursuant to Section 337, Nationality Act of 1940 (8 U.S.C. 737) and pursuant to the similar requirements of the Act of September 27, 1906 (43 Stat. 596) in effect prior thereto.

2. That I have caused diligent examination and search to be made of said records, and that there does not appear therein any record filed pursuant to the foregoing statutes nor any record whatsoever evidencing the naturalization of one Louis Raphael De Pratu or Louis Patrick De Pratu.

[Seal] /s/ HENRY COLARELLI,
Chief, Information, Mail and Files Section.

Affirmation

I affirm that Henry Colarelli, whose signature is affixed next above, now holds the title and position, and is custodian of Central Office records of this Service, as described in the foregoing.

[Seal] /s/ T. B. SHOEMAKER,
Acting Commissioner Immigration and Naturalization Service.

The Court: Well, that seems to be the answer, Mr. Acher. The government says that of all the millions of people that might be named in this record that no such name as that appears. The objection will be overruled and the exhibit will be admitted in evidence.

(Plaintiff's Exhibit 6, being a certificate by the Department of Justice Immigration and Naturalization Service, signed by L. Paul Winnings, General Counsel, and dated April 10, 1947, was here received in evidence and read to the jury. The same will be certified to the Circuit Court of Appeals by the Clerk.)

(Whereupon, court stood in recess from 11:00 o'clock a.m., until 11:10 a.m., at which time the following proceedings were had:)

(Jury returns to courtroom.)

Mr. Pease: In the recess, I have conferred with Mr. Acher, your Honor, and accordingly I understand that it may be stipulated between the parties to the cause that on February 8, 1936, this defendant filed an application for registry as an alien, signed by him, and stating in part, "I, Louis Raphael De Pratu, Gillman, Montana, an alien, believing that there is no record showing that I am now a lawful permanent resident of the United States, hereby request that under the provisions of the Act of Congress approved March 2, 1929, a record of registry of my arrival in the United States be made," and further Mr. Acher desires to have included in the stipulation a stipulation which [83] he will add.

Mr. Acher: That on April 15, 1937, the defendant was advised by the United States Department of Labor Immigration and Naturalization service that the central office in Washington had cancelled the application for registry filed by Louis Raphael De Pratu on February 10, 1936, and returned him the registry fee submitted with his application. The Central office further advised that this action was taken for the reason that registry in the case was unnecessary since it appeared that De Pratu entered the United States prior to June 30, 1906.

The Court: Very well, it will be so understood as stipulated and the record will so show it.

FRANK S. NOONEY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pease:

Q. Please state your name.

A. Frank S. Nooney.

Q. Where do you reside?

A. In Spokane, Washington.

Q. Are you an official of the United States?

A. Yes.

Q. What is your official capacity? [84]

A. I am Assistant to the District Operations Officer in the Spokane Office of the Immigration and Naturalization Service.

Q. What is the territorial jurisdiction of that office?

A. It takes in the State of Montana, the State of Idaho, Washington, east of the Cascade Mountains, and the five northeast counties of Oregon.

Q. Does that office have a permanent record of naturalization proceedings in that territory?

A. It has a record of all naturalizations in that territory.

Q. And what persons, person or persons, have in their custody, in their official custody, that record?

A. The District Director would be the official custodian. He is head of the District.

(Testimony of Frank S. Nooney.)

Q. What is your capacity with reference to those records? A. I am assistant.

Q. Do you have access to the records and do you have authority to possess them and use them?

A. Yes.

Q. Do you have the records here?

A. I have the file in the De Pratu case here.

Q. You have the file. Now, have you made a search of the record to determine whether this defendant, Louis Raphael De Pratu was ever naturalized as a citizen of the United States?

A. I have.

Q. And what has been the result of that search?

A. I found no record.

Q. Do you have any records relating to this defendant? A. Not of his naturalization.

Q. Not of his naturalization? A. No.

Mr. Pease: You may cross-examine.

Cross-Examination

By Mr. Davidson:

Q. You state you have no record of application for naturalization made by Mr. De Pratu. Isn't it true that if a child is automatically made a citizen of the United States by reason of the naturalization of his parent, you would have no record of it?

Mr. Pease: Objected to as calling for the opinion of the witness upon matters which the Court takes judicial notice of as a matter of law.

The Court: No, I don't think so, because as I understand the question, he was asked whether or

(Testimony of Frank S. Nooney.)

not he has a record of children whose parents have been naturalized during minority. Objection overruled.

A. Not necessarily.

Q. You would have if they applied for a derivative certificate? A. That's right.

Q. But otherwise you would not have?

A. That's right. [86]

Q. Mr. Nooney, do you know whether or not that is true of every immigration and naturalization office with respect to the records of children?

A. Yes, sir; that is correct.

Redirect Examination

By Mr. Pease:

Q. Do you have a record, does your office, rather, have a record of aliens residing within that territory who have not been naturalized?

A. Yes, we do.

Q. And have you made a search of that record with reference to the matter of Louis Raphael De Pratu with reference to the matter of Louis Raphael De Pratu or Louis Patrick De Pratu?

A. I have searched all records in our office with reference to Louis Raphael De Pratu.

Q. What does that search disclose?

A. We have a record of his registration as an alien.

(Witness excused.)

ARTHUR MATSON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pease:

Q. What is your name?

A. Arthur Matson. [87]

Q. Where do you live?

A. I live in San Francsco at the present.

Q. Are you an officer of the United States?

A. Yes.

Q. How long have you been such?

A. Twenty-four years.

Q. In what station, your capacity at the present time, your official capacity?

A. I am an Immigra*nt* Inspector.

Q. Previous to having your post of duty in San Francisco, was it here in Montana? A. Yes.

Q. Where were you stationed in Montana?

A. Sweetgrass, Montana.

Q. Do you know the defendant in this case, Louis Raphael De Pratu? A. Yes, sir.

Q. Did you have to do with this defendant in the month of September, 1946? A. Yes, sir.

Q. I will ask you whether a Board of Special Inquiry was instituted or constituted at that time?

Mr. Acher: One moment. To which we object on the ground it is calling for a conclusion of the witness, assuming facts not shown by the record. The regulations and laws set forth [88] what would have to be done to constitute a board.

(Testimony of Arthur Matson.)

Court: Is there anything in writing concerning that?

Mr. Pease: The record was made, your Honor, and I have the record here. I was asking some preliminary questions.

The Court: Well, if it is simply preliminary and you will follow it up with the record, I will overrule the objection. However, if you don't, I think I should sustain it at this point.

Q. Were you a member of a board which sat at Sweetgrass, Montana?

A. Yes, I was chairman of that Board.

Q. You were Chairman of that Board. Was a record made of the constitution of the Board, or constituting of the Board and of the hearing, or either? A. Yes, there was.

Q. I show you plaintiff's Exhibit No. 7, Mr. Matson, and ask you to examine it?

A. This is a transcript of the record.

Q. And who caused that to be made?

A. The Clerk, who was a member of the Board, made it in shorthand and thereafter made this transcription.

Q. Did you participate in the proceedings, that is in the taking of testimony before that Board?

A. Yes.

Q. And did you see the defendant, De Pratu, there at that time? [89] A. Yes.

Q. I show you page 10 of the exhibit, Exhibit No. 7, page 10.

(Testimony of Arthur Matson.)

Mr. Acher: I don't think it is an exhibit yet.

Mr. Pease: It is an identified exhibit. I know it isn't admitted.

Q. I am showing you Exhibit 7 and asking you if you were personally present?

A. Yes, I propounded questions.

Q. You personally propounded questions to the witness? A. That's right.

Q. Is the record there made—you may state whether the record there made of the questions and answers on page 10 are or are not correctly given according to your recollection of the fact?

Mr. Acher: One moment, to which we object upon the ground that a proper foundation has not been laid, and it appears that someone else took the testimony, and I would like to ask a question or two in support of my objection.

Examination

By Mr. Acher:

Q. Mr. Matson, you testified that a Clerk took stenographic notes? A. That's right.

Q. And he made a transcription?

A. That's right. [90]

Q. Now, since you have been here for this trial, you have refreshed your recollection by reading his transcript, have you not?

A. I read it, yes.

Q. Several times?

A. Not necessarily, because this is a case that has remained with my memories.

(Testimony of Arthur Matson.)

Q. And how many cases, how many people do you admit, have you admitted since September, 1946?

A. I admit lots of people but I don't hold very many of these hearings.

Q. The transcript you hold in your hands was not written by you? A. No.

Q. Have you with you the original notes that were taken at the hearing?

A. I believe they are in the courtroom, yes. I don't have them with me personally; they are not in my custody at the present.

Mr. Acher: We object on the ground that the proper foundation has not been laid. The witness has already testified he has refreshed his memory from things, and things not written by himself, but by someone else.

The Court: He also testified that he personally propounded these questions. What other foundation is necessary for the [91] testimony of the witness who said he propounded certain questions to another individual.

Mr. Acher: He says that as a result of having read over something somebody else wrote.

The Court: It makes no difference. Did you hear the answers given to those questions as propounded.

The Witness: Yes.

Mr. Acher: We submit he should not be permitted to use this transcript in testifying as to his recollection because it hasn't been—(interrupted)

(Testimony of Arthur Matson.)

The Court: The District Attorney is doing—now is identifying a transcript by a man who was there and asked questions appearing here and the answers given to the questions.

Mr. Acher: I didn't know the record showed that.

The Court: I just asked him the question if those answers were given, and he said yes. It was in response to a question of mine. The objection will be overruled.

Mr. Pease: I will ask you to read down to the 9th answer.

Mr. Davidson: We object on the ground that no proper foundation has been laid, because it hasn't yet been shown that the testimony was given at a Board duly authorized to administer oaths and to take testimony.

The Court: Well, that goes back to the original objection that Mr. Acher made as to how, in what manner this Board was convened. Was there a writing convening it, or how or in what [92] manner it was convened. Whether the Board had authority to administer oaths, or not, is, in my opinion, something that is immaterial, because the statute doesn't require that a representation of citizenship be made under oath before it is unlawful. A representation not made under oath, if untrue, would be as unlawful as one made under oath.

Mr. Acher: The indictment in the third count charges it. We have a case in 133 Federal second which went into great detail as to the authority of

(Testimony of Arthur Matson.)

the officer, and it was held there was no offense because the officer wasn't qualified. It is on page 15 of the brief.

The Court: Well, yes, that was a case of perjury. This isn't a case of perjury at all.

Mr. Acher: It is our position that the third count charges perjury because it says it was done under oath, and it says "Wilfully and falsely," and as the language of 746(a)(18)—(interrupted)

The Court: The third count, in my opinion, isn't legally sufficient to charge perjury. If the man was being prosecuted on a charge of perjury, I would have sustained the motion to dismiss on the third count, because in my opinion, the count isn't legally sufficient to charge perjury at all. There may be sufficient in the count, if the statements made under oath by the defendant there before this Board were untrue, were false, it may be that he might be guilty of perjury, but he is not [93] being prosecuted for perjury at all in this case on this indictment. It seems to me that under the authority of the Circuit Court of Appeals of this Circuit, and under the statute, all that is necessary to charge the offense in the indictment is contained in the first seven lines of the indictment, and that all after that, to me, is surplusage in the indictment, not necessary to the charging of the offense at all. It is all evidence, as I view it. It is simply a recitation of some of the evidence and circumstances and what transpired. Well, we are getting away from the question. Ordinarily, as far as I know, the procedure is that

(Testimony of Arthur Matson.)

when a writing has been offered in evidence and admitted by the Court, the witness doesn't read the exhibit to the jury, it is done by counsel in the case.

Mr. Pease: I believe that is the proper course. I will offer in evidence the first nine questions and answers on page 10 of Exhibit 7 for identification.

The Court: As I understood, you have already made the offer and over objection it was admitted.

Mr. Pease: I don't believe it was offered, your Honor.

(Whereupon, an adjournment was taken until 2:00 o'clock p.m., the same day, January 8, 1948, at which time the following proceedings were had:)

ARTHUR MATSON

resumed the stand for further

Direct Examination

By Mr. Pease:

Mr. Pease: If the Court please, to clarify the record, I want to now offer the following portions of plaintiff's Exhibit [94] 7, namely, the certificate appearing at the front of the instrument, that portion of page 1, consisting of the title of the proceedings and the recitals as to the members of the Board, the number, the serial number of the board, date and so forth. In other words, down to and including the words "determine admissibility," and that portion of Page 10 of the proceedings being the testimony of the witnessed named as Patrick De Pratu down to the ninth answer given and shown upon page 10.

PLAINTIFF'S EXHIBIT NO. 7

(Not Admitted)

United States of America, Department of Justice, Immigration and Naturalization Service, Sweetgrass, Montana

January 2, 1948

Pursuant to Title 28, Section 661, U. S. Code (Sec. 882, Revised Statutes), I hereby certify that the annexed paper is a true copy of the original appearing in the record of the Immigration and Naturalization Service, Department of Justice, relating to Louis Joseph Gonzy, file No. 1011-1720.

In Witness Whereof, I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first written above.

[Seal] /s/ JOHN A. PHILIPS,
Officer in Charge, Immigration and Naturalization Service.

Record of Hearing

Before a Board of Special Inquiry, Held at Sweetgrass, Montana

Date: September 11, 1946.

Names of Aliens—Louis Joseph Gonzy, Male, Age 35 years.

Present: Insp. Arthur Matson, Chairman; Henry A. Dube, Member; John D. Mead, Member-Secretary.

INT.—

B.S.I. No. 1011-1720

Arrived (date and manner): September 11, 1946, via private auto.

Held by: Henry A. Dube.

Cause: Determine admissibility.

* * * * * * *

Mr. Patrick De Pratu

called to the board room.

Chairman to Mr. De Pratu: This board wishes to consider your testimony in the matter of the application of Mr. Gonzy for admission to the United States. Are you willing to testify under oath before this board?

A. Yes.

Q. Do you solemnly swear that the statements you make at this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God? A. Yes.

Q. You are warned that if you wilfully and knowingly give false testimony at this proceeding, you may be prosecuted for perjury, the penalty for which is imprisonment of not more than five years or a fine of $2000, or both such fine and imprisonment. Do you understand? A. Yes.

Q. What is your full name?

A. Louis Patrick De Pratu.

Q. Where were you born?

A. In Ontario, Canada.

Q. Of what country are you now a citizen?

A. United States.

Q. When and where did you acquire United States citizenship?

A. I come over here when I was a little kid. I crossed at Sault Ste. Marie.

Q. How did you acquire United States citizenship?

A. I didn't. They told me that I was under age and that I was a citizen.

Q. Was your father born in the United States?

A. No, in the old country. I acquired United States citizenship through my father who naturalized in the United States while I was a minor.

* * * * * * *

Mr. Davidson: To which the defendant objects, if the Court please, on the grounds that it has not yet been shown that a duly constituted Board of Inquiry was organized or any Board with authority to inquire into defendant's citizenship. It affirmatively appears from the offered exhibit that the

hearing relates to one Louis Joseph Gonzy and the materiality of defendant's citizenship is not shown to be a proper or necessary subject of inquiry. That it does not appear that the alleged Board of Inquiry had a matter before it that could properly be considered by it with respect to the alien about which the hearing was held. That the record further affirmatively shown that a proper Board of Inquiry was not organized at the time and place referred to in the proposed exhibit, and that no proper foundation has been laid for the admission of the proposed exhibit.

Mr. Acher: We should like to be heard briefly on one proposition, at least, that we have not discussed before. [95]

(Jury retires from Courtroom.)

Mr. Acher: If the Court please, at the outset on the proposed portion of the exhibit which has been offered, I think it will appear that Inspector Dube excluded the alien, and thereupon Inspector Dube and two other alleged inspectors conducted a hearing as a Board of Inquiry. We found only one case on the subject, page 14 of our brief, United States vs. Redfern.

The Court: That is a prejury case you talk about, isn't it?

Mr. Acher: No, that hasn't to do with perjury. It has to do with the holding that a Board of Inquiry which included as a member a man who had theretofore excluded the alien was void ab initio. If the Court please, all the decisions say there must

be some adequate reason or some right to inquiry or ascertain a defendant's citizenship. It is true that in a later case they have held that where a man makes a representation to procure employment and the like, the employer has adequate reason, but here, we have a decision which shows on its face, which shown the Board of Inquiry illegal and void. In that case it was held their finding was not grounds for excluding the alien, and we submit there is no such showing as would authorize a conviction any more than if it were shown the defendant made this statement boastingly or as a joke, as was suggested in the Achtner case, 144 Federal second. It is further submitted that before this would be admissible, it would [96] have to be shown that the materiality of the defendant's citizenship had something to do with the matter. If the title of the proceeding were that of United States against De Pratu, the question would be different, but here it shows on its face that it relates to an alien named Gonzy; and we further submit there is nothing in the record to date to show that the Board of Inquiry had any authority to consider the matter of excluding or admitting the alien Gonzy; and in this connection, we think it would be developed, if it were shown here, that this alien was excluded on the theory he would violate the Contract Labor Laws, had a contract for employment in the United States, whereas, the statute, which we have cited in our brief, says a professional singer or artist is exempt from the Contract Labor Laws, and if that is the

fact, as the law says, we submit that the government would have to show that this was a matter that a Board of Inquiry could properly look into. That had not been done, and until it was done, a proper foundation was not laid for the admission of this exhibit.

Mr. Pease: With reference to the Redfern case, your Honor, we have examined the abstract of the case, and it appears in the first instance that the case is clearly distinguishable from the present case. The aggrieved party in the Redfern case was an alien who had been excluded by the Board of Special Inquiry in question, and, therefore, it was a question directly involved in the controversy, namely the charge [97] that the Board contained an unqualified member or a member who was prejudiced or was not impartial, and the only person who had any standing in court to question was that the alien Redfern who had been excluded.

The Court: That was a direct attack upon the order of that Board of Inquiry?

Mr. Pease: That is correct. Here it comes collaterally. In the second place, the District Court—this is not a Circuit Court of Appeals decision, it is a District Court decision for Louisiana—to us it seems very strange, in that there is no statute providing that the officer who initiated the proceeding against the alien seeking admission may not be qualified. It was not a Circuit Court case, your Honor, and it was in the year 1910. These statutes have been revised a number of times since then. However, there isn't any statute now existing or

which existed in 1946—whether it did formerly exist in 1910, or not, I don't know, we haven't had time to search—providing, for instance, that Mr. Dube, who is the agent in question here, was disqualified from sitting on the board of special inquiry by reason of the fact that he had detained the alien and instituted the further investigation of the grounds upon which admission was sought. Section 153 of Title 8 contains apparently all the law on how Boards are constituted. It reads in part, "Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated [98] by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards." Then it goes on to provide in certain cases for maintenance of a permanent board, which this was not, and I have found nothing further in regard to qualifications of members of Boards of Special Inquiry, so it is impossible to understand the Redfern case as applying to the statute as it now exists, whatever it was at the time the case was decided. As to the objection of materiality, I think that has been determined against the objections by the Ninth Circuit Court.

Mr. Acher: May it please the Court, on page 13 of my brief will appear the applicable sections, 152 and 153, and also the Code of Federal Regulations, beginning at the bottom of page 13 and the top of page 14, which shows the regulation with respect to the creation of boards of inquiry. Now, in the Redfern case, there was no statute. It was the Court's opinion in the last paragraph, simply stated, "It is fundamental in American jurisprudence that every person is entitled to a fair [99] trial by an impartial tribunal, and a board of special inquiry constituted as in this case is at least open to suspicion. I do not believe the law contemplates that the inspector who makes the preliminary examination shall serve on the board of special inquiry, and I must hold in this case that the board which denied to petitioner the right to land was illegal and without power." We then follow that with a case in the Third Circuit. I admit it is a perjury charge, but nevertheless, they did go into the status of the officer, found he was not authorized to administer an oath, and, therefore, the accusation could not be supported. In connection with Section 152, it seems to me I should like to call atention to the fact it provides, "Said inspector shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter," and so forth, and "to make a written record of such evidence; and any person to whom such an oath has been administered, under the provisions of this chapter, who shall knowingly or wil-

fully give false evidence or swear to any false statement in any way affecting or in relation to the right of any alien to admission, shall be deemed guilty of perjury." I suggest our view has merit; that count 3 comes within that provision, and that the government can't take the position it has that those allegations in Count 3 are surplusage merely because at the top they designate it a violation of 746(a)(18).

The Court: Well, I think no matter how the District Attorney [100] designates the charge, what the charge is is to be determined from the reading of the language of the indictment itself. Too, I see nothing at this time that would justify any criticism of the holding of the Court in United States v. Redfern. I am rather inclined to believe were that particular case before me, the same result might have been reached as was reached by the Court in the Redfern case in Louisiana; and, of course, it does not seem if an alien is being, or rather his right of entry is being determined as an alien, that one of his judges should be a man who had made up his mind as to whether he did or did not have the right of entry. That seems to me simply natural justice. Here it seems to me that there must be some writing some place with reference to the appointment of these boards of inquiry. I think that was done by writing. It seems to me that the statute and the regulations provide, or their full import is that the inspectors shall be designated, by the officer in charge in writing, a board of inquiry for that purpose, and were the question here a question as

to whether or not there actually was a board of inquiry sitting, whether or not they were acting lawfully as a board of inquiry, or if the question before me were one in some way reviewing an act of that so called board of inquiry, why there wouldn't be any doubt in my mind that the objection made by counsel for the defendant that the writing appointing the members of the board of inquiry is the best evidence would be good. No other evidence [101] would be competent in the case to establish the fact if there were a challenge made on that point; but that seems to me to be collateral matter. As I view it, we are not sitting here determining or reviewing anything that the board of inquiry did, we are sitting here under a specific charge that the defendant, upon being interrogated as to his citizenship, said he was an American citizen. That is the end of it, the board of inquiry is collateral matter and matter of no importance here. The question, and, as I view it, the only thing of importance as to the Board of inquiry is whether or not the men who were there, who asked the questions, properly could ask that kind of question and had a right to inquiry; whether or not they were inquiring because of performance of official duty or whether or not they were inquiring out of a matter of idle curiosity that did not concern them either personally or officially; and I am not too certain about how important that is, because the statute under which the prosecution is based simply says that one who falsely represents himself to be a

citizen when he is not, is guilty. I think they might possibly have obviated this by questioning this witness further. The witness might possibly have been interrogated a little further to develop from him, if he knows, who were there, who were present, to develop from him, if he knows, whether or not they were officers of the United States Immigration Service, to develop whether or not, if he knows, what their purpose was in being there, to develop whether or not, if he knows of his own knowledge, what the point of the interrogation was, what was attempted to be established, and whether or not there was a request for any official action after the taking of the testimony. I think there would have been a much better foundation laid if that was done. But, however, the evidence does disclose that this man was an officer of the United States. He has testified to that. He was there, he put these questions. As to his purpose, the object of the things that were done by him, the evidence is not clear. However, I think the evidence is in such condition that the jury might infer from it that he was there as an officer acting in his official position at the time the defendant was interrogated. He said he put the questions to him and that he knows the questions were put and the answers were made. So, I am going to sustain the objection as to the first part of the offer, that is the certificate, and that is because I am going to sustain the objection as to that portion of the first printed page headed "Record of hearing before a Board of Special Inquiry

held at Sweetgrass, Montana," because in my view, the evidence, as it now stands, is not sufficient to establish that there was a board of special inquiry either de jure or de facto acting at the time. I am going to overrule the objection as to the— (interrupted)

Mr. Acher: In view of the Court's ruling to date, your Honor, I think we should make separate objections to the questions [103] 1 to 9 so each will be subject to the objection.

The Court: Well, I think I will sustain the objection to this offer of this exhibit in its entirety. However, if the District Attorney desires, if the witness was there and submitted certain questions to this defendant and certain answers were made and he knows that of his own knowledge, the District Attorney may desire to inquire further along those lines.

(Plaintiff's Exhibit 7, being entitled "Record of Hearing before a Board of Special Inquiry held at Sweetgrass, Montana, Date September 11, 1946, and bearing certificate signed by John A. Philips, Officer in Charge, Immigration and Naturalization Service, dated January 2, 1948, was here refused admission in evidence. The same will be certified to the Circuit Court of Appeals by the Clerk.)

Mr. Pease: I wish also to lay further foundation, your Honor.

The Court: Very well.

(Jury returns to Courtroom.)

(Testimony of Arthur Matson.)

Q. (By Mr. Pease): Mr. Matson, you testified this morning concerning a hearing which was had at which you presided in the month of September, 1946, at Sweetgrass, Montana. Was or was not Sweetgrass, Montana, at that time, a port of entry?

A. It is a regularly designated port of entry for aliens.

Q. Of the United States? A. That's right.

Q. You state you were a chairman?

A. That's right. [104]

Q. Who were the other members of the Board?

Mr. Acher: One moment. To which we object. The record would be the best evidence.

The Court: Yes, that is true. Were there other men there besides yourself? A. Yes.

The Court: What were their names?

A. Inspector Dubie and Inspector Mead.

The Court: Inspector Dubie, how long have you known him? A. Three or four years.

The Court: Do you know what if any office he held with the United States?

A. Inspector with the Immigration and Naturalization Service.

The Court: How long had you known Inspector Mead?

A. Approximately the same time.

The Court: Do you know whether or not on that September 11, 1946, he held any official position with the United States.

A. Both were immigrant inspectors.

(Testimony of Arthur Matson.)

The Court: How long had Inspector Mead been an inspector?

A. Oh, he arrived in Sweetgrass during the war and probably in 1943.

The Court: You, yourself, were an immigration inspector at that time? A. Yes.

The Court: Very well, proceed. [105]

Q. (By Mr. Pease): Where is Inspector Mead at this time?

A. He is serving in the same capacity at Anchorage, Alaska.

Q. How long has he been there?

A. He went up there probably four or five months ago.

Q. Was any other record made—or what was done to bring these men together for this purpose?

A. Well, they were orally designated by the inspector in charge, and I was the inspector in charge on that date, and since only three members were available, why Inspector Mead and Inspector Dubie and myself composed the Board of Special Inquiry.

Q. Well, were you the person who summoned the others or requested them?

A. Yes, I did.

Q. Did you do that in writing or verbally?

A. Orally.

Q. Was there any written record made of the appointment of either of those men or yourself?

A. The only written record would be on the first page of the stenographic notebook made by the clerk and member, Inspector Mead.

(Testimony of Arthur Matson.)

Q. Well, the stenographic notebook you referred to is available here, is it not?

A. I am quite sure it is.

Q. Is there any part in longhand, or is it all in shorthand? [106]

A. I have never seen the record.

Q. You have never seen them. Well, outside of the record made in Exhibit 7, was there any other written record kept in the office, made or kept in that office?

Mr. Acher: We object on the ground that he heretofore testified it is in the notebook which is here in Court. He hasn't seen it—(interrupted)

The Court: What good would that be unless you know shorthand if it is written in shorthand hieroglyphics? It is something that cannot be read except by one with a knowledge of shorthand. I know that if you produce a shorthand record before me, it wouldn't give me any information at all.

Mr. Acher: My point, your Honor, is simply the man that made that would be the man to call.

The Court: But the whole point that seems to appeal to me is that here is a man who said he was there, he put the questions and he knows the answers that were made. What better record there can be than that, I don't know. He was there, he was personally present and what all this time is being taken up for to prove a record when that is the situation, when the man said he was there and asked him the questions, I don't know. I don't know of any possible better record there can be, and I

(Testimony of Arthur Matson.)

so hold. Ask the witness those questions and answers you want to prove; ask him if he knows.

Mr. Pease: Very well. Will you state what questions you [107] asked of the defendant De Pratu at that time, and what answers he made?

A. Do you wish to have me make them from memory?

Q. Is it possible for you to give them correctly without reading the transcript which you testified about this morning?

A. I can. I asked him several questions which are a formality insofar as our work is concerned, but word for word. of course that is impossible.

Q. Can you do it accurately by referring to the transcript you have in your hand? A. Yes.

Q. Please do so.

Mr. Acher: That is the whole point of our objection. He does have to come back to the transcript. He has shown himself not qualified to do it.

The Court: How has he shown himself not qualified? Any memorandum this witness knows is true is sufficient for him to refresh his memory with, isn't it? Do you have any statute?

Mr. Acher: I have a statute. I will hand it to your Honor. It is Section 10664, Revised Codes of 1935, and a Montana case in 99 Montana.

The Court: Well, of course, the statute says a witness is allowed to refresh his memory respecting a fact from anything written by himself or under his direction. That doesn't say that is the only method known to the law, but it says a witness [108]

(Testimony of Arthur Matson.)

may refresh his memory. That is one of a number of ways, this isn't all inclusive and excluding everything else. If that was the case, records of book entries and things of that kind and other voluminous records that are made in the ordinary course of business by a number of different men, no witness could come into Court and testify unless he himself had made the record. Here is a witness that says he knows, after reading that, he knows he propounded the questions that are set out in it. That is his testimony. Did you propound those questions, witness?

A. Yes.

The Court: Who did you propound them to?

A. To Mr. De Pratu.

The Court: A witness in the case?

A. Yes, sir.

The Court: Fold that memorandum up. In any question you propounded to him at that time, did you ask him whether he was or was not a citizen of the United States?

A. Yes, sir.

The Court: What did you say?

A. I usually ask of what country are you a citizen.

The Court: I don't care what you usually say, what did you say to that man?

A. Of what country are you now a citizen.

The Court: What did he say? [109]

A. He said of the United States.

(Testimony of Arthur Matson.)

Q. (By Mr. Pease): Did the defendant during the proceeding referred to express any interest in having the board act one way or another upon this application?

Mr. Acher: Objected on the ground it is immaterial.

The Court: Overruled.

A. He naturally was interested in importing this man Gonzy to appear as a musician at the Stockman's Club in Great Falls.

Mr. Pease: You may cross examine.

Cross-Examination

By Mr. Davidson:

Q. Mr. Matson, were you present during all of the proceeding and asked Mr. De Pratu all the questions asked of him? A. Yes.

Q. Isn't it true, Mr. Matson, on that day you had no reporter?

A. No reporter? A clerk was reporter.

Q. Do you recall me being there in Sweetgrass at that time? A. Yes.

Q. Isn't it true that just prior to the time you started asking the witness questions that you advised me you had no reporter but you would have to do the best you could? A. That's right.

Q. During the time this Mr. Mead was taking the notes, did he have any difficulty with any of the witnesses? [110]

A. He is a shorthand man himself, Inspector Mead is.

(Testimony of Arthur Matson.)

Q. Did he have any difficulty in taking down the notes of the questions and answers of the witness?

A. I don't believe he did.

Q. Well, that wasn't the only question you asked Mr. De Pratu, was it? A. Oh, no.

Q. Did you ask him the question as to how he acquired United States citizenship? A. Yes

Q. And did he answer the question, "I didn't"?

A. He mentioned the fact that when he entered the United States—(interrupted)

Q. Will you please confine yourself to that question.

A. Yes, I am trying to bring it down.

The Court: Mr. Davidson, the proper rule is that if you are examining a witness from a writing you have in your hand, show the writing to the witness.

Q. Did you ask him how he acquired United States citizenship? A. Yes.

Q. What answer did he give you?

A. He said someone had told him he had acquired it because he came to the United States when a young fellow, that's about the way.

Q. Do you know whether or not, in response to that question, [111] he started out by saying, "I didn't"? A. I don't recall that.

Q. But you do recall him saying he became a citizen by reason of his father's naturalization?

A. He said something about that too, but his first reply was someone told him he had acquired it because he came to the United States when he was a young fellow.

(Testimony of Arthur Matson.)

Q. Showing you now this memorandum, Mr. Matson, I will ask you to inspect it and particularly that marked question, "How did you acquire United States citizenship?" A. Yes.

Q. And the answer thereto?

A. "I didn't, they told me I was under age and I was a citizen." Now, I remember that last statement of his, but I didn't remember that.

Q. So, are you now satisfied that in answer to the question "How did you acquire United States citizenship" that the defendant answered, "I didn't, they told me I was under age and that I was a citizen"? A. Well, that's correct.

Mr. Davidson: That's all.

Mr. Pease: That's all.

(Witness excused.)

Mr. Pease: The government rests.

Mr. Acher: At this time we would like to move to strike [112] the portion of the testimony of the witness Matson where, in response to interrogation by the Court, it was stated that the defendant told him he was a citizen of the United States upon the ground that the evidence constitutes a material variance from the allegations of the indictment.

The Court: In what respect?

Mr. Acher: The indictment says that these statements were made before a Board of Special Inquiry. There is no proof of that now. The evidence is it was before Mr. Matson.

The Court: The motion will be denied.

Mr. Acher: At this time, we make a motion for judgment of acquittal, which I have in writing. I may have the wrong thing, your Honor, I see that I——

The Court: It is important in criminal cases, Mr. Acher, to get hold of the right thing. I will give you an opportunity to drop the wrong one and grab the right one, if you can.

Mr. Acher: I will see how that came about. I didn't expect them to rest quite so soon. We will make a motion for judgment of acquittal orally, I don't have it in writing.

The Court: Very well, do you want to make it in the presence or absence of the jury?

Mr. Acher: We would prefer to do it in the absence of the jury.

(Jury retires from the Courtroom.) [113]

The following is the written motion for judgment of acquittal filed on behalf of the defendant at the close of the government's case on January 8, 1948:

(Title of Court and Cause.)

Motion for Judgment of Acquittal

Comes now the defendant and moves the Court to order the entry of a judgment of acquittal upon the following grounds:

1. That the first count of said Indictment fails to charge an offense against the laws of the United States of America, or at all.

2. That the second count of said Indictment fails to charge an offense against the laws of the United States of America, or at all.

3. That the third count of said Indictment fails to charge an offense against the laws of the United States of America, or at all.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant.

Mr. Acher: Comes now the defendant and moves the Court to order the entry of a judgment of acquittal upon the following grounds:

1. That the evidence is insufficient to sustain a conviction under count 1 of the indictment;
2. That the evidence is insufficient to sustain a conviction under count 2 of the indictment;
3. That the evidence is insufficient to sustain a conviction under count 3 of the indictment.

The Court: Do you desire to argue it, or do you submit it?

Mr. Acher: We would like to argue it, your Honor.

The Court: Very well, proceed.

Mr. Davidson: May it please the Court, the most essential element of this offense is the question as to whether or not the defendant is a citizen of the United States, because regardless of what statements might have been made, if the government fails to prove by the evidence that he was not a citizen of the United States, there is no offense.

We submit there is no evidence before this Court showing that this defendant is not a citizen of the United States, and the affirmative evidence, as shown by the exhibits, and particularly by Exhibit

5 of the plaintiff, which is the alien registration form, discloses that the defendant was born October 21, 1878, in Alexandera, Ontario, Canada. He states that he came to the United States at Sault St. Marie, Michigan, on August 15, 1896, and at that time, he was 17 years of age. It further [115] states he has resided in the United States permanently, and his last entry into the United States, as shown in one of these exhibits, is shown to be that same date in 1896. So that we have affirmative evidence that this man came to and has resided in the United States since he was 17 years of age. Count 3 charges him with stating that he became a citizen of the United States by reason of his father's naturalization, and from this affirmative evidence, it is shown that that could have happened. This man was in the United States at the age of 17 years. Under the law as it existed at that time, had his father become a naturalized citizen at any time prior to the time defendant became 21 years of age, the defendant automatically became a citizen. So, the government has failed to close that door. They have charged in count 3 of their indictment that that was one of the claims of citizenship that he made, and they have failed to come into this court and prove that Mr. De Pratu's father was not a citizen of the United States. If Mr. De Pratu's father was a citizen and became such prior to the time that Mr. De Pratu became 21, the defendant having been in the United States at that time, he automatically became a citizen of the United States. They charge

that is false, but there is no proof here that he did not become a citizen of the United States by reason of the naturalization of his father. So, there is absolutely no proof.

Mr. Nooney testified to this Court that there would be absolutely [116] no record in the Immigration and Naturalization Service of the naturalization of Mr. De Pratu had he become naturalized as a minor through derivative citizenship unless he made application for a certificate of derivative citizenship.

So, we submit to the Court that the government has failed to prove that this man is not a citizen of the United States. They might argue that they have an admission, but they do not have an admission. It is the alien registration form, which is a part of Exhibit 5 of the plaintiff, "I am a subject or citizen of, Uncertain," he writes in there, "but last of Canada." In other words, he didn't know when he made that application as to his citizenship, and apparently, not willing to run any risk, he did register because of the uncertainity in his mind as to his citizenship. There is nothing in that exhibit which shows that the defendant is not a citizen of the United States. There is nothing in the statement that has been entered from the application for registration that would cause this court to say that this man is not a citizen of the United States.

Now, the Court probably knows, it is common knowledge, that there are many people mistaken as to citizenship. I know in my work for the past 30 years on these people's applications for citizen-

ship. We have on one or two occasons, with the consent of the government, brought and prosecuted proceedings for citizenship for people we knew were citizens because there was no proof and in order that a record might be made of their [117] citizenship. So, I submit to the Court, on that one ground, having failed to show that the defendant's father or his mother did not become a citizen of the United States during the minority of this defendant, that the government has failed in its case, and my argument, repeated to the Court, is that under count 3, the government should have come here prepared to show that fact, because they state in count 3 that he claims citizenship by reason of the naturalization of his father. Now, having made that charge, it would seem to us that the government should have come into this Court prepared to show that the statement is not true, and there is absolutely no evidence before this Court as to the citizenship of Mr. De Pratu's father, and particularly during the time that this defendant was under the age of 21 years.

The Court: Well, I can go with you on a part of your argument, Mr. Davidson. I think it is sound. I think that portion of your argument where you maintain that the burden is on the government to prove that this defendant was not a citizen of the United States when he made the representation is sound. I don't have any doubt about it. But here is the question. That is the burden that is on the government as before the jury. This question now if for me to direct a verdict of acquittal, and if there

is any evidence at all in the case from which the jury could reasonably conclude that the man was not a citizen, I have no right to direct a verdict of acquittal. If the evidence [118] is in such state that the minds of reasonable men could differ, I have no right to direct a verdict, and there is admitted in evidence this exhibit, Exhibit 5, a writing signed by the defendant in which he said he was born at or near Alexandera, Ontario, Canada. That is his statement. If the jury accepts that statement as true, that establishes his citizenship right there, and establishes that he is not a citizen of the United States. Now, there is a legal presumption that a condition once shown to exist is presumed to exist as long as things of that nature exist. So, he has established himself by his statement as a citizen of a country other than the United States. Now, there is no presumption at all that I know of that one gains citizenship by reason of lengthy residence in the United States; no such presumption as that that I know of now exists. In answer to the question, "I am a citizen or subject of," he said, "Uncertain, but last of Canada." So he there again says that his last citizenshp status that he knew about was that of a Canadian. He does say, "Uncertain," which means little to my mind, and certainly it doesn't mean that he believes he is a citizen of the United States. He doesn't say there he believes he is a citizen of the United States, but is uncertain about it. He said he was uncertain about his citizenship, the last he knew about it was he was a Canadian. Of course, it is true, and in my

opinion, you are correct in your argument that if he came to this country when [119] he was 17 years old, and that is the evidence, and his father or mother came with him, and his father was thereafter naturalized, if he was under 21 years old at the time his father was naturalized, he became a citizen; but if, at the time of his father's naturalization, he was over 21 years of age, he would not become a citizen. But there is no presumption that I know of that his father came here and was naturalized. There is no presumption that he was naturalized while this man was under the age of 21 years, so as to grant to defendant the benefit of derivative citizenship through the citizenship of his father. In other words, the question is how far is the government required to go in its proof to exclude all hypotheses and all conjecture, no matter how extreme they may be. I don't think that the government, in order to make a prima facie case, is required to go to that length, is required to go to the length of showing whether the father of this defendant himself became a naturalized citizen of the United States, and further to show that if the father did become naturalized, he did not become naturalized during the minority of this defendant and while this defendant was residing in the Unite States. To me that seems to be requiring or placing a burden of proof upon the government that the government couldn't possibly be expected to assume, and particularly in view of the testimony of the inspector here that was given and stands uncontradicted that they may or may not have a record

of a minor child whose father [120] was admitted to naturalization, depending upon the record the father furnishes at the time of his admission to citizenship.

So, the motions for a directed verdict or for judgment of acquittal made orally will be denied. The motions for a judgment of acquittal made in writing and filed with the Clerk separately as to each count will be separately denied as to each of the counts. Call in the jury.

(Jury returns to Courtroom.)

The Court: Open for the defense.

Mr. Acher: May it please the Court, counsel, ladies and gentlemen of the jury, the defendant in this case expects to prove that in 1944 an application was filed with the Secretary of State of the State of Montana, and a charter was issued to the Stockman's Club, a non-profit organization, having clubrooms in Great Falls near the Northern Montana State Fair grounds. We expect to prove and it will be developed, that under the liquor and beer laws of Montana, a club is not entitled to sell beer or liquor until they have been in existence a certain number of years, one or two, I am not clear myself. The statutes say one in one place and two in another. In any event, the evidence will show that following the formation of this club as a corporation organized under the laws of Montana, a building was constructed. It took over a period of a year or more, building this building, and that about the time it was ready for [121] occupancy, application was made for beer and liquor license for this establishment.

The evidence will show that the defendant, Mr. De Pratu, had been in the restaurant and hotel business for many years at Augusta, then I believe the evidence will show he operated the restaurant in the Park Hotel, Great Falls; then he operated for many years, some eight or 10 years, a restaurant at the Stockyards where we read in the paper they sell cattle twice a week in Great Falls; and then this Club idea was conceived and carried into execution, and an application was filed for a beer and liquor license, presented through Mr. Sherman Smith, a lawyer, no relation to Paul W. Smith, attorney for the Liquor Control Board, who rejected the application on the ground that the club wasn't in existence a sufficient length of time. We expect to show that notwithstanding that fact, it was suggested a license could be issued to one of the individuals, and that without a new application a license was issued to Mr. De Pratu.

That Mr. De Pratu was not intending to represent anything about his citizenship, and that the idea of the application was for the Stockman's Club and not for Mr. De Pratu.

We expect to show that in due course, the time elapsed when the club became qualified, and that the license was transferred to and is now in the name of the Stockman's Club, a non-profit corporation.

We expect to show that Mr. De Pratu did not read these [122] printed documents, but filed them and that he had no intention to make any false representation as to his citizenship, and that, therefore, no offense is shown under the charges in the indictment.

PAUL W. SMITH

heretofore sworn, called as a witness upon behalf of the defendant, testified as follows:

Direct Examination

By Mr. Acher:

Q. Will you state your name, please?

A. Paul W. Smith.

Q. You are the same Paul W. Smith who heretofore testified on the part of the government in this case? A. Yes.

Q. Mr. Smith, showing you defendant's, or rather plaintiff's Exhibit No. 2, I will ask you whether or not that was presented to you as the attorney for the Montana Liquor Control Board on or shortly prior to February 16, 1946?

A. Yes, it was.

Q. Were you requested to advise the Board as to whether or not a license could be issued?

Mr. Pease: If the Court please, I would like to interpose an objection to the line of testimony which has been outlined in counsel's opening statement for the defendant, both as to the testimony of this witness and any others in the same subject matter on the ground that the same does not constitute a defense and that the same is irrelevant to the issues of the cause, and incompetent to establish any defense to the action.

The Court: Well, I listened to the opening statement. It may be a question as to whether or not it establishes a defense. Still, there is a question of intent involved here, and it may be competent

(Testimony of Paul W. Smith.)

on the question of intent, and of course if the defendant, on that question of intent, desires to establish the fact that he entered into a conspiracy to violate the laws of the State of Montana, there may be some materiality in that. I think I will overrule the objection. That seems to be what the evidence will establish.

Mr. Acher: If you will answer the question, please.

A. Yes, I was requested to advise the Board.

Q. And what action did you take in connection with the application?

The Court: Of course, I think if you ask for conversation, it is hearsay unless the defendant was present.

Mr. Pease: Action, I presume, means official action and the expression of an opinion or something of that kind?

Mr. Acher: That's right.

The Court: So, if you gave an opinion, witness, or something of that kind, you may so state without stating what the opinion was.

A. Yes, I gave an opinion relative to the application which I [124] hold, plaintiff's Exhibit 2.

Q. And what was that opinion?

Mr. Pease: Objected to until it is shown whether in writing or oral.

Q. Was it oral or in writing?

A. It was oral.

The Court: Isn't this hearsay? Was the defendant present when the opinion was given?

(Testimony of Paul W. Smith.)

Mr. Acher: If the defendant asks for hearsay, can the other side object?

The Court: Yes, certainly, hearsay isn't competent no matter who asks for it. Cases are tried by competent evidence, and hearsay isn't competent evidence.

Mr. Acher: We expect to show negotiations with the lawyer for the defendant.

The Court: You haven't shown anything like that.

Mr. Acher: I was leading up to it. Did you have any dealings directly with Mr. De Pratu about this matter personally?

A. Not directly with De Pratu.

Q. Did you have any dealings with anyone purporting to represent him?

A. Yes, Sherman W. Smith, attorney in Helena.

Q. Tell briefly what the negotiations were, what the result was.

Mr. Pease: Objected to on the ground there is no foundation [125] laid showing the purported authority or the extent thereof of Mr. Sherman Smith.

The Court: Sustained.

Q. Did you know Mr. Smith and know that he was acting as attorney for the defendant, Mr. De Pratu?

Mr. Pease: Objected to as calling for an opinion.

Mr. Acher: He is an attorney licensed to practice.

The Court: He was an attorney licensed to practice, but being licensed to practice doesn't license

(Testimony of Paul W. Smith.)

you to represent someone. I am going to overrule the objection because apparently you are asking if the man knows of his own knowledge whether Sherman Smith represented this man.

A. Yes. Sherman Smith filed the application with the Board himself.

Q. And, now, what advice, or I mean, what decision did you communicate to Mr. Sherman W. Smith as to whether a license would be granted, or whether it wouldn't? Tell it in your own way.

A. I told Sherman Smith and also Mr. Buley, who was administrator for the Board that the Stockman's Club could not hold a liquor license because it had not been organized prior to two years before making application to the Board, which was the Montana law.

Q. In your consideration of this application was it deemed an application of De Pratu individually or an application of the [126] Stockman's Club?

Mr. Pease: To which we object on the ground it is not the best evidence, it calls for the opinion of the witness, and it calls in effect for an interpretation of official action, of which there must be some record and which record must be the best evidence.

The Court: Yes, sustained. It is an invasion of the province of the jury. It is an exhibit in evidence, and it is for the jury to say whether it is an application made by De Pratu or the Stockman's Club. It is a question for them to decide, not for a witness on the witness stand.

(Testimony of Paul W. Smith.)

Mr. Acher: At this time, I think I have laid the foundation and we would like to offer in evidence defendant's Exhibit 4, which I believe the testimony shows was presented simultaneously with Exhibit 2.

Mr. Pease: Objection, the same objection to the offered exhibit as was heretofore made to it, that is to say, on the same grounds, and specifically on the ground that it is not relevant or material to the issues of this cause, having to do with and being a separate application for a different type of license and not a part of the transaction which is charged in the indictment.

The Courts: Let me see the offered exhibit. Well, this transaction was not mentioned in the indictment at all. It seems to me if it was admitted it would constitute but an encumbrance on [127] the record. I fail to see where it has any bearing on the case here or where it is material in any respect at all. It is an application for a beer license, apparently on a regular state form. I don't consider it material. It is an encumbrance on the record. The objection will be sustained.

(Defendant's Exhibit 4, being an application for a Retail Beer License to the Montana Liquor Control Board by L. P. De Pratu dated January 15, 1946, was here refused admission in evidence. The same will be certified to the Circuit Court of Appeals by the Clerk.)

#6747 - USV Louis R. DePratu

Lyle E. H. (not admitted)

14

Cascade

(County in which license is to be used).

FEE $200.00

DO NOT SEND PERSONAL CHECK
Make Separate Remittance for Each Fee

Cash Item No.

Beer License No. R

Liquor License No. B. L. L.

Montana Liquor Control Board

HELENA, MONTANA

Application for Retail Beer License

Application must be completely filled out and sworn to before a Notary Public or other person authorized to administer oaths. The statutory fee must accompany this application and will be returned if the Board shall find that the undersigned is, or are, not qualified.

L. P. DePratu

(Full names of all applicants for this license. Please print or type).

The Stockman's Club

(Trade name which applicant, or applicants, intend to call such business).

619 - 2nd Street Northwest, Great Falls, Montana

(Location by street and number and city or town of the the premises where the business is to be carried on under the license, if issued.)

TO MONTANA LIQUOR CONTROL BOARD:

The undersigned, desiring to possess and have for sale beer, under the provisions of Montana Beer Act for the purpose of selling it at retail, hereby apply to you for a license so to do and tender with this application the license fee provided for. In support of this application, and in order to show the qualifications of the undersigned to be issued such license, that is to say, that the undersigned is, or are, of good moral character, and is a law abiding person, or are law abiding persons, and is a fit and proper person, or are fit and proper persons, to sell beer, EACH FOR HIMSELF OR HERSELF gives the following information and makes the following statements:

(a) That the undersigned is over the age of twenty-one years;
(b) That the undersigned is not the keeper of a house of ill fame;
(c) That the undersigned has never been convicted of being the keeper of a house of ill fame;
(d) That the undersigned has never been convicted, either under the laws of the federal government or of the State of Montana, of pandering;
(e) Have you ever been convicted, either under the laws of the federal government or of the State of Montana, of any other crime or misdemeanor? (Answer "yes" or "no")..... No
(f) If you have answered "yes" to the last preceding question, give the particulars of such crime or misdemeanor. .....
(g) Has ever any license to sell beer at retail, issued under the Montana Beer Act to you, or in which you were interested as a partner, been revoked for cause? (Answer "yes" or "no")..... No
(h) Are the premises for which such license is sought inside of the boundaries of an incorporated city or town? (Answer "yes" or "no")..... Yes .....;
(i) That the Board or any member thereof, or its duly authorized representative, or any peace officer of this state shall have the right at any time, and is hereby given the authority, to make an examination of the premises of the undersigned and to check the books, records and stock in trade of the undersigned and to take an inventory thereof and in the event any beer or liquor is found which is being kept or held in violation of the law, he may immediately seize and remove the same;
(j) That the undersigned, or his or her employee or employees, will not sell, deliver or give away, or cause or permit to be sold, delivered or given away, any beer to any person under the age of 21 years;
(k) That if the undersigned is granted the license applied for, the undersigned will abide by all rules and regulations of the Board relating to the "Montana Beer Act," and will not violate any law of the United States, or of the State of Montana, or any legal city ordinance relating to beer or intoxicating liquor, and will not knowingly permit any agent or employee so to do, it being the express understanding that violation of any rule or regulation of said Board, or of any city ordinance relating to beer or intoxicating liquor by the undersigned, or any of the same, or of any agent or employee of the undersigned, shall be sufficient grounds for the revocation or suspension of the license herein applied for.

Dated at Great Falls, Montana this 15th day of January, 1946

L. P. DePratu

(Signatures of all Applicants)

STATE OF MONTANA
COUNTY OF Cascade } ss.

L. P. DePratu

(Names of All Applicants)

being first duly sworn, each for himself, or herself, deposes and says: that he, or she, has read the foregoing application and knows the contents thereof; and that the same is true to the knowledge of deponent.

L. P. DePratu

(Signatures of All Applicants).

Subscribed and sworn to before me this 15th day of January, 1946

[illegible]
Notary Public for the State of Montana.
Residing at Great Falls, Montana.
My Commission expires Oct. 20, 1948

NPM'o. A-4724

(Testimony of Paul W. Smith)

Q. (By Mr. Acher): I will show you defendant's proposed Exhibit 3—I am not sure whether the record shows or not—but I will ask you whether or not that application was submitted with and as a part of the same transaction as plaintiff's Exhibit 1?

Mr. Pease: That is objected to on the ground that the exhibits themselves referred to, both 1 and 3, on their face show they are not a part of the same transaction, but are distinct instruments and have a distinct character.

The Court: I will sustain the objection as it calls for the opinion of the witness on a question of law and fact, and that is whether or not it was done as part of the same transaction. If it were material, it would be a question for the jury to decide.

Mr. Acher: Mr. Smith testified that he handles these matters, and that is what I was relating to.

The Court: That isn't what your question was. It was a compound [128] question asked him, whether or not it was filed with the other application and as a part of the same transaction, and it calls for his conclusion of law and fact on the next question of whether the two instruments constitute part of the same transaction.

Q. (By Mr. Acher): Mr. Smith, was defendant's Exhibit 3 filed at the same time as plaintiff's Exhibit 1? A. Yes.

Q. And were licenses—state whether or not licenses were issued simultaneously on the two applications.

(Testimony of Paul W. Smith.)

Mr. Angland: To which we object, your Honor. It is immaterial, has no probative value in this cause.

Mr. Acher: I am merely trying to lay the foundation to offer this exhibit.

The Court: Well, I don't think that what was done thereafter constitutes any part of the foundation, Mr. Acher. In my opinion, if from your theory, you haven't laid the foundation now, you couldn't fortify it any by showing whether licenses were or were not issued. The question here before the jury is the representation that was made in the written application, not what was done after. Whether the representation was acted on or not is not highly material in my opinion. The gist of the offense here was the writing contained in the application, the statement he made, and the truth of that statement.

Mr. Acher: I want the record to be clear that these two [129] applications were received by the Liquor Control Board simultaneously.

The Court: He said they were filed together, what more can the record show?

Mr. Acher: We offer in evidence defendant's Exhibit 3.

Mr. Pease: Same objection as heretofore made to Exhibit 4, namely that the same is irrelevant to the issues of the cause, pertains to a different transaction, does not tend to establish any defense to the charge contained in the indictment.

(Testimony of Paul W. Smith.)

The Court: Well, ladies and gentlemen, I must ask you to retire again.

(Jury retires from Courtroom.)

The Court: Where do you deem this material, Mr. Acher?

Mr. Acher: It says that this application is made by a corporation, that form states that, and I thought it would be corroborative of the evidence we will have which indicates that this man intended these applications to be for a club, and the fact that the Liquor Control Board issued it to him would not make him retroactively guilty of a crime. It is a question of his knowingly doing something. The other application is ambiguous. You will note that it says the application is not made for an individual, it is made for a president, by the president and manager; and in connection with motive, we expect to show that there are three incorporators, two, citizens without question; [130] that after this trouble arose, the license was transferred to one of the other incorporators until such time as this club had been in existence the requisite period, when the license was actually issued to and is now held by the club. We submit that the whole crux of this lawsuit is knowingly and falsely, whether or not the actions were done knowingly and falsely, and the jury has a right to consider the application made, and if it is ambiguous, and to determine whether this man read it and knew what he was signing. I know that in examining papers for other

people, I read them very carefully, but I have gone places and signed papers without reading them for myself, and I think the jury may have a right—(interrupted)

The Court: They may have a right, but they are certainly going to be charged that he is held to the same degree of responsibility as if he had read them. These papers are not idle forms, and if an individual makes an application to the state in which these questions are asked him and if there is a fact falsified, because they are printed and he did not read it, it will not excuse him. The jury is going to be charged in this case that he is held to the same degree of responsibility as though he did read it and knew what he was signing.

Mr. Acher: That may be true, your Honor. The answer could be true. He could construe it in that way. In the first question, "State in what capacity you make this application," he answered, "president and manager." [131]

The Court: That is your argument as to the construction of the liquor license. I am frank to say that the argument does not appeal to me; you are wasting your time making it to me, but I can't say as to the jury. I am inclined to think in his offer of this document that counsel is correct, Mr. Pease, in his argument that he has made to me that this goes to the question of intent. In other words, I believe that evidence should be received on that question. The indictment charges that this was done knowingly, falsely and feloniously. The word

"feloniously" simply defines the degree of the offense; in other words, it constitutes a felony rather than a misdemeanor. That is the only significance of that word. But this is a question of intent, of the falsity of the statement in the indictment, that it was done falsely. Now, that certainly means untruthfully, that it was untruthful; that means not only it was untruthful, but it means that the defendant knew at the time what the truth was. That is the import of that language. If the statement was made through inadvertence, negligence or carelessness, I don't know that a conviction would be justified.

Mr. Pease: The objection was, your Honor, it didn't have any tendency to prove a lack of knowledge or lack of intent. It seems to me to be on a different plane from this document here in which the representation of citizenship is contained.

The Court: Well, of course, there is no representation of citizenship in this application for a retail license for beer [132] at all.

Mr. Pease: That's right. He might have signed thousands of documents in which he made no such representation which would be immaterial and irrelevant to this issue here. That's what strikes me at the outset. He didn't have to say anything about citizenship in that one.

The Court: That is true. If a man knowingly and falsely makes a false statement in one instrument, it wouldn't be a defense to it no matter how

many instruments he made in which he didn't make it.

Mr. Acher: There is one other point. The one application, the June application, in answer to question 5, it says, "If a corporation, has the corporation been organized and doing business in Montana for 5 years," which would indicate if this was an individual, there wouldn't be any answer to put in there.

The Court: But many individuals would think it meant, "Are you applying on behalf of a corporation," and say no. Different constructions can be placed on it.

Mr. Pease: It seems also to me, your Honor, to be of importance here that this whole line of attempted defense seeks to impeach, is an attempted impeachment of the very instrument which he did sign, and which apparently he is going to admit he did sign, naming the Stockman's Club in answer to the question, "What is the trade name which the applicant intends to call such business." He had a competent attorney representing and [133] advising him at that time. And this, "the full names of all applicants for this license"—not the applicant, but all applicants for this license. That is under the first dotted line which has the name L. P. De Pratu typed upon it. So, it seems to me they are getting to a point of contradiction.

The Court: Well, that is what I think, too, but then on the other hand, that is the reason I sustained the objection to Exhibit 4. There is no such

language in proposed Exhibit 4 as there is in the proposed Exhibit 3. Here the question is, "State in what capacity you make this application." He says, "Corporation," that is typewritten in. There is no such question or answer at all contained in Exhibit 4, as I view it. On the other hand, here is a man who makes an application signed by himself to be permitted to sell liquor, he wants a license for that purpose. Under the law of the state, it is necessary for him to apply for a license to sell beer. In other words, if he doesn't have a beer license, he cannot obtain a liquor license, as I understand it. So, this beer application was made out at the same time as the liquor application. I don't think that either one is a part of the other, but one was in furtherance of the other. They were sent out at the same time, they were certified at the same time, and certainly it appears to me the only reasonable construction which could be placed on the two applications is that the same applicant, be it corporation or individual, was applying for both licenses. And so, in this [134] paper, in this application that was made in point of time coincidental with the liquor license application there is the statement, "State in what capacity you make this application," answer, "Corporation." Well, of course, that to me, I see no particular significance to it, particularly under the statement of counsel for the defendant here that this man has been in the United States for years, he has been a business man and operated a business; he has done those things; he is a man of intelligence

and knows something about business and business forms. Now, it seems to me, that anybody with that experience would know if a corporation submits an application, it is made in the corporate name, signed by the corporate officers and the seal of the corporation is attached; it isn't made in an individual's name and signed by the individual with no designation at all. In addition to that, the evidence so far apparently discloses it was done with the advice and guidance of an attorney, an able attorney. I know Mr. Smith, Mr. Sherman W. Smith, and know his ability, and I don't think, if that is true, any such confusion should have crept into these instruments; but still it gets back to this question of intent. I say that is the construction I would place on it. However, I think the jury might disagree with me, and it is within their province. I don't know that they would, but I think it is within their province. I don't know of any question in the trial of a criminal case that is more peculiarly a jury question than the question [135] of intent, and I think the Court should, where that question is involved, as it is here, should be somewhat liberal in permitting evidence on that question to go to the jury. After all, this is the defendant's side of the story, and while I say it may not impress me, it may impress the jury, I don't know. He should have the opportunity to tell it to them. So, the objection will be overruled and it will be admitted in evidence simply and purely as to the question of the intent of the defendant.

(Jury returns to Courtroom.)

(Testimony of Paul W. Smith.)

Q. (By Mr. Acher): Mr. Smith, do you have with you the records of the licenses which were issued pursuant to the applications, plaintiff's Exhibits 1 and 2?

A. You mean the licenses issued?

Q. The records. I think the government brought out that they were issued. Will you refer to your records and see whether or not the licenses were transferred and, if so, the date of the transfer and to whom?

Mr. Acher: It just came to my attention, your Honor, that Exhibit 3 was offered and the Court admitted it and it hasn't been read. Could I have leave to read it at this time?

(Defendant's Exhibit 3, being an application for a Retail Beer License made to the Montana Liquor Control Board by L. P. De Pratu, dated June 27, 1946, was received in evidence and here read to the jury. The same will be certified to the Circuit Court of Appeals by the Clerk.)

#6747 - US v Louis R. DePratu
Defts Ex 3 (admitted)

15

Form 702—4M—4-46

FISCAL YEAR
1946
July 1, 1946 to June 30, 1947

(DO NOT USE THIS SPACE)
Cash Item No.
Beer License R. No. 1170
Liquor License R.L.L. No. 1171

(County in which license is to be used.)

FEE $200.00

Montana Liquor Control Board
HELENA, MONTANA

Application for Retail Beer License

Application must be completely filled out and sworn to before a Notary Public or other person authorized to administer oaths. The statutory fee must accompany this application and will be returned if the Board shall find that the undersigned is, or are, not qualified.

L. P. DE PRATU
(Full names of all applicants for this license. Please print or type.)

THE STOCKMAN'S CLUB.
(Trade name which applicant, or applicants, intend to call such business.)

619 3d street N. W. Great Falls, Montana
(Location by street and number and city or town of the premises where the business is to be carried on under the license, if issued.)

TO MONTANA LIQUOR CONTROL BOARD:

I hereby apply for a Retail Beer License and under oath make the following statements and answer the following questions, to-wit:

(a) State in what capacity you make this application.
CORPORATION
(State whether owner, partner, or if corporation, state your office, or in any other capacity.)

(b) If a partnership or other joint venture, give the names of all interested parties.

(c) Are you over the age of twenty-one years? Yes

(d) Are you a keeper of a house of ill fame? No

(e) Have you ever been convicted of being the keeper of a house of ill fame? No

(f) Have you ever been convicted, either under the laws of the federal government or the state of Montana, of pandering or other crime or misdemeanor opposed to decency and morality? No

(g) Have you ever been convicted for violation of any law or ordinance relative to sale of liquor or beer? No

(h) If you have answered "yes" to the two last preceding questions, state the particular offense, date, court and place of conviction.

(i) Has any license to sell beer at retail issued under the Montana Beer Act to you, or in which you were interested as a partner or otherwise, ever been revoked? No

(j) Are any brewers and/or wholesalers of beer interested either financially or otherwise, directly or indirectly, by leasing or furnishing any premises, furniture, fixtures, equipment or other property in the conduct or operation of your business? No

(k) Are the premises for which such license is sought inside the boundaries of an incorporated city or town? Yes

(l) That the Board or any member thereof, or its duly authorized representative, or any peace officer of this state shall have the right at any time, and is hereby given authority, to make an examination of the premises of the undersigned and to check the books, records and stock in trade of the undersigned and to take an inventory thereof and in the event any beer or liquor is found which is being kept or held in violation of the law, he may immediately sieze and remove the same;

(m) That the undersigned, or his or her employee or employees, will not sell, deliver or give away, or cause or permit to be sold, delivered or given away, any beer to any person under the age of 21 years;

(n) That if the undersigned is granted the license applied for, the undersigned will abide by all rules and regulations of the Board relating to the "Montana Beer Act", and will not violate any law of the United States, or of the State of Montana, or any legal city ordinance relating to beer or intoxicating liquor, and will not knowingly permit any agent or employee so to do, it being the express understanding that violation of any rule or regulation of said Board, or of any city ordinance relating to beer or intoxicating liquor by the undersigned, or of any agent or employee of the undersigned, shall be sufficient grounds for the revocation or suspension of the license herein applied for.

Dated at Great Falls, Montana, this 27th day of June, 1946.

L. P. DePratu
(Signatures of All Applicants)

STATE OF MONTANA, }
COUNTY OF Cascade } ss.

L. P. DePratu
(Names of All Applicants)

being first duly sworn, each for himself, or herself, deposes and says: That he, or she, has read the foregoing application and knows the contents thereof; and that the same is true to the knowledge of deponent.

L. P. DePratu
(Signatures of All Applicants)

Subscribed and sworn to before me this 27th day of June, 1946

Wm Moore
Notary Public for the State of Montana.
Residing at Great Falls, Montana.
My Commission expires 2/15/48

MAKE SEPARATE REMITTANCE FOR EACH APPLICATION

REMITTANCES MUST BE BY BANK DRAFT, MONEY ORDER OR EXPRESS ORDER. PERSONAL CHECKS WILL NOT BE ACCEPTED.

(Testimony of Paul W. Smith.)

(Question read by the reporter.)

A. I have an assignment from L. P. De Pratu to Louella Lundby for retail liquor license No. 1170, or rather retail beer license No. 1170 and retail liquor license No. 1064.

Q. That is the liquor license referred to on plaintiff's Exhibit 1? A. Yes, it is.

Q. What is the date of that assignment?

A. The date of the assignment is October 3, 1946.

Q. Then, Mr. Smith, can you trace the history of the license for that place from Miss Lundby? How long did it stand in her name and then to whom was it transferred?

Mr. Angland: To which we object, your Honor——

The Court: Sustained.

Mr. Acher: It is on the question of motive, your Honor, to show the club now has said license.

The Court: The evidence here shows that he transferred it out of his name to the other. What difference does it make what the other did with it?

Mr. Acher: We will follow it up by showing that the club and the club members—(interrupted)

The Court: That doesn't make any difference. If the club got the license, it got it through another individual than this defendant. [137]

Defendant's Offer of Proof No. 6

We offer to prove that the license was later transferred from Miss Lundby to the Stockman's Club on February 5, 1947.

Mr. Pease: The government objects to the offer of proof numbered 6 handed to me on the ground that the same is irrelevant and immaterial and does not tend to prove any defense to the charge in the indictment, and specifically that it is a subsequent transaction and can have no bearing on the motive, intent or anything else or any other element of the offense charged in the indictment.

The Court: The offer of proof will be numbered consecutively and the objection will be sustained.

Mr. Acher: You may cross-examine.

Mr. Pease: No cross-examination.

(Witness excused.)

EMMA LUNDBY

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Acher:

Q. Will you state your name, please?

A. Emma Lundby.

Q. Where do you live, Miss Lundby?

A. At Great Falls, Montana. [138]

Q. How long have you known the defendant, Mr. De Pratu? A. Just about 20 years.

(Testimony of Emma Lundby.)

Q. And have you been associated with him in business? A. Yes, sir.

Q. For how long? A. The same time.

Q. Do you have a relative who has likewise been associated in business with Mr. De Pratu?

A. Yes, a sister.

Q. What is her name?

A. Louella Lundby.

Q. And briefly, what has been—what is your business at the present time?

A. At the Stockman's Club.

Q. You and your sister and Mr. De Pratu all are officers of the Stockman's Club?

A. Yes, sir.

Mr. Acher: At this time, the defense offers in evidence as proposed Exhibit 8 a certified copy of the charter of the Stockman's Club, a Montana corporation, and as Exhibit 9, the Articles of Incorporation of the Club, which are filed in the office of the Secretary of State.

Mr. Pease: The offers are both objected to on the ground they are irrelevant to the issues of the case, your Honor.

The Court: Well, Exhibit 8 may have some bearing on the question [139] of intent here. The objection will be overruled and the exhibit will be admitted in evidence. It seems to me Exhibit 9 would be somewhat of an encumbrance of the record. Mr. Acher, is there anything in the by-laws you intend to rely on or you think of any importance here?

(Testimony of Emma Lundby.)

Mr. Acher: No, your Honor, it was simply to show there was a corporation, and I didn't know whether the certificate would be enough to establish that. It isn't the by-laws, it is the articles of incorporation.

The Court: I think the certificate of the Secretary of State certifying that articles of incorporation has been filed in his office and that such association is a body corporate and politic and authorized to do business in the State of Montana is sufficient to establish the corporation's existence.

Mr. Acher: I will withdraw the offer of Exhibit 9 at this time.

Court: Very well.

(Defendant's Exhibit 8 was here received in evidence, was read to the jury, and is as follows:)

1st Page

"Department of the Secretary of State of the State of Montana

I, Sam W. Mitchell, Secretary of State of the State of Montana, do hereby certify that the annexed is a full, true and correct copy of the original Certificate of [140] Incorporation issued to

The Stockman's Club

by this Department on the fourteenth day of October, A.D. 1944.

In Witness Whereof, I have hereunto set my hand and affixed the Great Seal of the State

of Montana, at Helena, the Capital, this sixth day of January, A.D. 1948.

(Great Seal of the State of Montana.)

/s/ SAM W. MITCHELL,
Secretary of State."

2nd Page

"Department of the Secretary of State of the State of Montana

Be It Known That the Stockman's Club

In accordance with the provisions of Chapter 42 of the Civil Code of Montana of 1935, as amended, has caused to be filed in the office of the Secretary of State of the State of Montana a certified copy of its Articles of Incorporation on the fourteenth day of October, A.D. 1944.

Now, Therefore, I, Sam W. Mitchell, Secretary of State of the State of Montana, do hereby certify that a certified copy of Articles of Incorporation of

The Stockman's Club

containing the required statement of facts prescribed by said Code, as amended, having been filed in this office, such Association is a body corporate and politic and is authorized to do business in the State of Montana, with continual succession.

Witness my hand and the Great Seal of the State of Montana hereunto affixed this fourteenth day of October, A.D. 1944.

(Great Seal)

SAM W. MITCHELL,
Secretary of State.
By CLIFFORD L. WALKER,
Deputy.

DCM.10"

Q. (By Mr. Acher): Miss Lundby, are you one of the three original incorporators of the Stockman's Club?

A. Yes, I am the treasurer and the secretary.

Q. Do you have with you the original minute book of the corporation? A. Yes, sir.

Q. I will ask you, Miss Lundby, whether or not this book which you have here before you is the original minute book of the Stockman's Club, a corporation? A. Yes, sir.

Q. I will ask you whether or not the minutes which are kept in this book were either written by you or written under your [142] direction and by you filed as Secretary of the corporation.

A. They were written under my direction.

Q. Showing you proposed Exhibits 10 to 16, inclusive, I will ask you whether or not they are the official and original minutes of the meetings of the corporation—it should be Exhibits 11 to 16, inclusive, are the minutes of the corporation from its incorporation to and including December 15, 1945?

A. Yes, they are the originals.

(Testimony of Emma Lundby)

Q. I will ask you whether or not Defendant's Exhibit 10 is the minutes of the meeting held prior to the formation of the corporation, which resulted in the articles being drawn and the charter being issued? A. I didn't get that question.

(Question read by the reporter.)

A. Yes, sir.

Q. Showing you proposed Exhibit No. 17, I will ask you whether or not,—that is 17 and 18 jointly—that is the heading of the minutes of a meeting held on Wednesday, February 20, 1946, showing who were present at the meeting and a portion of the proceedings held at that meeting?

A. Yes, sir.

Mr. Acher: We now offer in evidence defendant's proposed Exhibit No. 15 first. That is the meeting of September 1, 1945.

The Court: Is there any objection?

Mr. Pease: Yes, your Honor, we object to the exhibit. It [143] seems to be in its entirety a narrative of proposed doings of the corporation and does not tend to show any material facts, any facts material to this case. It is, as to the defendant in this case, wherever it may be considered material, self-serving. It seems to me it would be an encumbrance on the record.

Mr. Acher: It is prior to the alleged commission of the offense.

The Court: It purports to be a meeting of the Board of Directors of a corporation that wasn't in existence at the time the meeting was held.

Mr. Acher: Yes, sir, your Honor. The corporation was formed in 1944.

The Court: That's right. Well, to the extent of the writing on the exhibit that I have enclosed in brackets, the objection is sustained. As to the balance that is not enclosed in brackets the objection will be overruled and the exhibit will be received in evidence.

(Defendant's Exhibit 15 was here received in evidence, was read to the jury, and is as follows:)

"Minutes of Regular Meeting of Board of Directors of Stockman's Club Held on Saturday, the 1st Day of September, 1945.

At the regular meeting of the Board of Directors of The Stockman's Club held in the City of Great Falls, Montana on Saturday, the 1st day of September, 1945, in accordance with the By-Laws of said Stockman's Club, there were present, Luella Lundby whose term expired as Vice-President; Emma Lundby, whose term expired as Secretary-Treasurer, and L. P. De Pratu, whose term expired as President and Manager of said corporation.

Upon motion duly made and seconded, and carried L. P. De Pratu was re-elected Director and President and Manager of said corporation.

Upon motion duly made and seconded and carried, Luella Lundby was re-elected Director and Vice-President of said corporation.

Upon motion duly made, seconded and carried, Emma Lundby was duly re-elected Director and Secretary-Treasurer of said corporation, all of said officers to hold office until the next annual meeting in September of 1946, unless a vacancy existed in accordance with law.

(Thereafter, L. P. De Pratu advised the other Directors of said corporation that said Stockman's Club was indebted to him in the amount approximating $20,000.00. The said L. P. De Patru thereupon advised the Directors that he did not care for any collateral or security to secure him for said money expended at that time, and that he would wait until some future time when he could advise the board of the exact amount of money which he had personally expended in the construction of said building.) The said L. P. De Pratu, thereupon offered to obtain slot machine licenses in accordance with the laws of the State of Montana and beer and liquor licenses for said establishment in accordance with the laws of the State of Montana and to pay for same personally, providing he would be secured at some future date for said expenditure.

Upon motion duly made, seconded and carried, the said L. P. De Pratu was thereupon directed to obtain said licenses as above set forth.

There being no further business before the meeting, upon motion duly made, seconded and carried said meeting was duly adjourned.

L. P. DE PATRU.
EMMA LUNDBY,
Secretary."

(The portion of the above exhibit enclosed in parentheses was refused admission in evidence and was not read to the jury.)

Mr. Acher: We offer in evidence defendant's proposed Exhibit [145] 17 and 18. No. 17 is just excerpts from the meeting of February 20, 1946. They should have been really marked as one exhibit, I guess. One is merely to give the date.

The Court: Is there any objection to the offer?

Mr. Pease: The same objection as to the last exhibit, your Honor, that the same does not tend to establish any defense or any element of the defense.

The Court: It looks to me as though there is merit in that. The main part of the exhibit is a report that the defendant made to the Board of Directors of this corporation. That is a self-serving declaration. As to whether or not the licenses were obtained, if they were obtained, the licenses themselves are the best evidence. Apparently, under the testimony as it has developed to this point, and from the opening statement of counsel for the defendant, any such report made as was purported to be made by the defendant to the Board of Directors of the

corporation was false as he had not done the things he said he did do. The licenses themselves are the best evidence. The objection will be sustained.

(Exhibits 17 and 18, offered by the defendant, were here denied admission in evidence, and are as follows:)

Exhibit 17

"Minutes of Special Meeting of Board of Directors of the Stockman's Club, Held on Wednesday, February 20th, 1946

Pursuant to law and waiver of notice heretofore made, [146] there were present Emma Lundby, Louella Lundby and L. P. De Pratu in the clubhouse of said club in the City of Great Falls on Wednesday, February 20th, 1946."

Exhibit 18

"Whereupon, L. P. De Pratu reported to the meeting that he had duly obtained slot machine licenses for the operation of eight slot machines, a State liquor license, a State beer license, a Cascade County liquor license, a Cascade County beer license, a City of Great Falls liquor license and a city of Great Falls beer license, together with the United States Government federal excise tax stamps and all of the necessary licenses issued by the State of Montana to operate a restaurant in connection with said club.

(Testimony of Emma Lundby)

Thereupon, by motion duly made, seconded and carried the meeting confirmed all of the acts and actions of the said L. P. De Pratu.

L. P. DE PRATU,
President.
EMMA LUNDBY,
Secretary."

Mr. Acher: We offer in evidence proposed Exhibit 10, being minutes of meeting of the 17th of June, 1944.

The Court: Any objection to that?

Mr. Pease: Yes, your Honor, we object to this on the ground that it is not an act of the corporation in question. It is apparently a form of agreement between parties intending to form a corporation and is superseded by the articles of incorporation, by the charter, and I don't suppose it is binding either upon the corporation or upon the government, or anybody except the persons who participated.

Mr. Acher: I thought it would shorten the record. I said I would withdraw Exhibit 9—(interrupted) [147]

The Court: I see no similarity at all between this exhibit and the articles of incorporation.

Mr. Acher: I think the non-profit club statute—I think the way you form it is by passing a resolution.

The Court: I am going to sustain the objection to Exhibit 10. It is completely and entirely imma-

(Testimony of Emma Lundby)

terial in my opinion to any issue here in this case. Objection sustained.

(Defendant's Exhibit 10 was here denied admission in evidence and is as follows:)

Exhibit 10

"On this 17th day of June, 1944, in the City of Great Falls, Montana, at a meeting called by L. P. De Pratu there were present: Emma Lundby, Louella Lundby and L. P. De Pratu.

L. P. De Pratu was elected temporary chairman and after discussing, and upon motion of Emma Lundby duly seconded by Louella Lundby, it was voted unanimously by those present that they would employ counsel, to wit: Sherman W. Smith, Esq., of Helena, Montana, to form a non-profit organization to be known as The Stockman's Club and to file articles of incorporation thereof in conformity with the laws of the State of Montana and to obtain a charter therefor.

There being no further business before the meeting, upon motion duly made and seconded and after the election of Emma Lundby by motion duly made and carried as Secretary of the meeting, the meeting was duly adjourned.

L. P. DE PRATU,
Chairman.
EMMA LUNDBY,
Secretary."

Mr. Acher: We will then offer Exhibit 11 which is the minutes of October 16, 1944.

(Testimony of Emma Lundby)

The Court: Do you have any objection to this?

Mr. Pease: Yes, your Honor, the exhibit is objected to in its entirety as immaterial to the issues of the case. There seems to be nothing in it at all about any licenses or proposed licenses or anything at all upon the subject matter of this case.

The Court: The objection will be sustained as to that portion of the minutes that I have enclosed in brackets. It will be overruled as to that portion that is not enclosed in brackets. The only thing I have left in is the election of officers. It is material to show who the officers of the corporation were.

(Defendant's Exhibit 11, which was admitted in evidence in part is as follows:)

Exhibit 11

"Minutes of the First Meeting of the Stockman's Club, Held in the City of Great Falls, Montana, on the 16th Day of October, 1944.

There being present all of the incorporators of said club, to wit: Emma Lundby, Louella Lundby and L. P. De Pratu, the following business was transacted:

(L. P. De Pratu reported to the meeting that a charter had been duly granted by the State of Montana after the original Articles of Incorporation were duly filed in the office of the County Clerk and Recorder of Cascade County, Montana, and a certified copy thereof was filed in the office of the Secretary of State of the State of Montana. L. P. De Pratu reported that

(Testimony of Emma Lundby)

he had paid Sherman W. Smith the filing fees and the attorneys fees for obtaining said charters. Thereupon, L. P. De Pratu was named as the Temporary Chairman and he called the meeting to order for the purpose of electing officers of said corporation.)

Upon motion of Emma Lundby, duly seconded by Louella Lundby, L. P. De Pratu was elected President and Manager of said corporation.

Upon motion of Emma Lundby and duly seconded by L. P. [149] De Pratu, Louella Lundby, by unanimous vote, was elected Vice-President of said corporation.

Upon motion of Louella Lundby and duly seconded by L. P. De Pratu, Emma Lundby was unanimously elected Secretary-Treasurer of said corporation.

Thereupon the officers just elected took their places and L. P. De Pratu presided over said meeting as President of said corporation. Thereupon, by motion duly made, seconded and unanimously carried, Emma Lundby, Louella Lundby and L. P. De Pratu were elected as directors of said corporation.

(Thereafter, L. P. De Pratu reported to the corporation as to his plans for building and completing a clubhouse to be the headquarters of said club and in which would be carried on the social activities of said corporation club and the membership thereof.)

(Testimony of Emma Lundby)

(Thereupon, upon motion duly made by Louella Lundby and seconded by Emma Lundby, L. P. De Pratu was authorized to proceed and to do everything necessary to build and to complete the clubhouse to house the activities of said club and its membership and to create indebtedness personally for the completion of said clubhouse with the understanding that at some future date an accounting would be made to said corporation by the said L. P. De Pratu and said corporation would then make arrangements to secure the said L. P. De Pratu for any and all sums expended by him in building and completing said clubhouse.)

There being no further business before the meeting, upon motion duly made, seconded and carried said meeting was duly adjourned.

L. P. DE PRATU,
President.
EMMA LUNDBY,
Secretary."

(The portions of the above exhibit enclosed in parentheses was refused admission in evidence and was not read to the jury.)

Mr. Acher: We offer in evidence defendant's Exhibit 12, proposed Exhibit 12. [150]

Mr. Pease: January 4th?

Mr. Acher: January 4, 1945. The rest of them, your Honor, go to trace the history.

The Court: Exhibit 12 will not be admitted. It is so apparently immaterial it looks to me like

(Testimony of Emma Lundby)
trifling with the Court and taking up time. It is simply trifling with the Court. Get down to something that is material to the issues of this case and let's start trying it.

(Defendant's Exhibit 12, which was refused admission in evidence is as follows:)

Exhibit 12

"Minutes of Special Meeting of Board of Directors, Held on Thursday, January 4th, 1945.

All of the Directors of said corporation having heretofore filed waiver of notice of special meeting of the Board of Directors of said corporation and Emma Lundby, Luella Lundby and L. P. De Pratu all being present, the following transpired at said special meeting held in the City of Great Falls on Thursday, the 4th day of January, 1945, with L. P. De Pratu as President, presiding:

L. P. De Pratu reported to the directorate the progress he had made in the construction of said building and reported the amounts of money expended by him personally.

Upon motion duly made by Louella Lundby and duly seconded by Emma Lundby, thanks were extended to the said L. P. De Pratu for the work done by him to said date, and upon motion duly made, seconded and carried it was voted the said L. P. De Pratu should continue his work of construction on said building.

(Testimony of Emma Lundby.)

There being no further business before the meeting, upon motion duly made, seconded and carried said meeting was duly adjourned.

L. P. DE PRATU,
President.
EMMA LUNDBY,
Secretary." [151]

Q. (By Mr. Acher): Miss Lundby, briefly, where had you and your sister and Mr. De Pratu been in business over this 20 year period you told about?

The Court: That's entirely immaterial. We are not going to trace the history of this witness over 20 years. Get down to the charges made in this indictment.

Q. Are you familiar with the application which was made for a retail liquor license in January, 1946? A. Yes.

Q. Had the Stockman's Club been in operation or open for business prior to January or February, 1946? A. No.

Q. Showing you plaintiff's Exhibit No. 2, did you see that before it was presented to the State Liquor Control Board? A. No.

Q. Well, in the minutes which have been read in evidence, it refers to an application being made for a liquor license for the Stockman's Club. Are you familiar with those minutes we read to the jury?

A. Yes, sir.

Q. Were you aware of an application being made for a liquor license? A. Yes.

(Testimony of Emma Lundby.)

Q. Showing you plaintiff's Exhibit No. 2, you will note the Notarial seal is by B. O'Neil? [152]

A. Yes, sir.

Q. Do you know that person?

Mr. Pease: Objected to as having nothing to do with the document. As far as we know, the seal proves his capacity.

The Court: It may not. I can't say at this time it does. I will overrule the objection, it may lead up to something.

Q. (By Mr. Acher): Did you have occasion to see this application before it was sent into Helena, or did you know anything about it?

A. Yes, I knew it was being made.

Q. And do you know who it was sent to in Helena?

A. The State Liquor Control Board.

Q. Sent direct, or to Sherman Smith, or do you know that? A. No, I don't know.

Q. Does Mr. De Pratu do typing? A. No.

Q. Was this filled out—do you have an office at the Stockman's Club? A. Yes.

Q. With typewriters and so forth?

A. Yes.

Q. Do you know whether or not this was filled out there? A. I don't remember.

Q. You don't remember. Showing you plaintiff's Exhibit No. 1, which is a like application six months later, I will ask you [153] who the Notary there, Mr. Moerl, where he was located?

A. Great Falls, Montana.

(Testimony of Emma Lundby.)

Q. Was he employed at the Stockman's Club?

A. Yes, sir, he was.

Q. At that time in June, 1946?

A. Yes, sir.

Q. As the bookkeeper? A. Yes sir.

Q. Miss Lundby, have you had occasion through your association in business with Mr. De Pratu to observe his ability to hear, whether he is hard of hearing or not?

A. Yes, he is hard of hearing.

Q. What have you observed as to how that affects his conduct with people, as to whether he avoids letting people know he is hard of hearing, and if so, how he does it?

Mr. Angland: To which we object, your Honor——

The Court: Sustained.

Mr. Acher: You may cross-examine.

(Whereupon, an adjournment was taken until Friday, January 9, 1948, at 10:00 o'clock a.m., at which time the following proceedings were had:)

EMMA LUNDBY

a witness on behalf of the defendant, resumed the witness stand.

Mr. Acher: Could I have leave to ask one or two questions?

The Court: Very well.

Q. (By Mr. Acher): Miss Lundby, your sister, Louella, was born [154] in the United States?

A. Yes.

(Testimony of Emma Lundby.)

Q. And lived in the United States all her life?

A. Yes.

Q. You were born in the United States?

A. Yes.

Q. And lived in the United States all your life?

A. Yes.

Q. Mr. De Pratu, the defendant here, is of the white race? A. Yes.

Mr. Acher: That is all.

Mr. Pease: No cross-examination.

(Witness excused.)

Mr. Acher: The defendant rests.

Mr. Pease: The government rests.

Mr. Acher: At this time, if your Honor please, the defendant would like to make a motion for judgment of acquittal, which is in printed form, although if your Honor prefers, I can read it.

(Jury retires from Courtroom.)

(Title of Court and Cause.)

Motion for Judgment of Acquittal

Comes now the defendant and moves the Court to order the entry of a judgment of acquittal upon the following grounds:

1. Upon the first count of the Indictment upon the ground that the evidence is insufficient to sustain a conviction [155] of the defendant of such an offense.

2. Upon the second count of the Indictment upon the ground that the evidence is insufficient to sustain a conviction of the defendant of such an offense.
3. Upon the third count of the Indictment upon the ground that the evidence is insufficient to sustain a conviction of the defendant of such an offense.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for defendant.

Mr. Acher: May it please the Court, in order to clear the record, yesterday I dictated a motion, and I served and filed a paper which I would like to have the record show as withdrawn because it wasn't a motion for a directed verdict. I would like to withdraw it so there won't be any confusion.

The Court: I had that in mind yesterday.

Mr. Acher: I didn't intend to file it. I dictated it.

The Court: You dictated it. When I ruled on your motions, I denied specifically your oral motion, and by separate order I denied the other written motion, so I think that keeps the record in good enough shape, because the motion was a motion for judgment of acquittal, and that, in my opinion, can be made at the close of the government's case. It might be better to leave the record that way because in case of misfortune down here for the defendant, the Circuit Court might decide there is [156] some merit to the motion. The defendant's motion for judgment of acquittal made at the conclusion of

all of the evidence is denied. The Court will be at ease for a moment until I get the proposed instructions.

Mr. Acher: I had three or four new instructions this morning. The first one is rather confusing——

The Court: I haven't seen them.

Mr. Acher: I handed them to the Clerk. The first one is rather confusing because it is just the liquor statutes and I also added three or four pages to our brief.

The Court: You have seen these, Mr. Pease?

Mr. Pease: Well, Mr. Angland has examined the instructions that were tendered yesterday, and I haven't looked at those. This morning, your Honor, I looked at some of those this morning you are referring to now that have just been tendered. I see we have again the question of circumstantial evidence and the question whether this is a circumstantial case.

The Court: Well, I don't see any fact that is necessary to be established here that hasn't been proved by direct evidence.

Mr. Acher: If the Court please, I think that the intent, that it was done knowingly, would have to be inferred from other facts proven in evidence, and that for that reason it is a circumstantial evidence case.

The Court: In other words, your position is in all cases in which knowledge or intent is an element of the offense, that [157] makes it a circumstantial evidence case and requires the giving of an instruction on circumstantial evidence?

Mr. Acher: The whole essence of this crime is falsely knowingly doing something. It is different from a murder case or an assault case or something of that kind.

The Court: In what respect? There you must prove an evil mind, guilty intent. In a murder case, first degree murder, premeditation and an intent is essential. What is the difference between intent in a murder case and any other case in which intent becomes essential to the crime?

Mr. Acher: I am not prepared to say you wouldn't be entitled to an instruction on circumstantial evidence in such a case, because in every murder case I have been involved in, we have gotten an instruction on circumstantial evidence.

The Court: In any I have been involved in, no instruction on circumstantial evidence with reference to intent has ever been given. But, is it your position that intent can only be proven by circumstantial evidence, that there is no other way to do it?

Mr. Acher: No, I think if we had some statements or admission or confession. A confession is direct evidence, an admission is not ordinarily, it requires inferences.

The Court: Well, do you think that an inference drawn by a jury from direct evidence is circumstantial evidence? The statute says what evidence is.

Mr. Acher: I would like to refer, your Honor, to a case [158] or two. United States v. Greene, 146 Federal, certiorari denied at 207 U. S., said "Direct evidence is that which immediately points to the question at issue. It is positive in its character. It

often depends upon the credibility and the intelligence of the witnesses who testify to knowledge of the facts. It may also be documentary in character. Indirect or circumstantial evidence is that which tends to establish the issue only by proof of facts sustaining by their consistency the hypothesis claimed, and from which the jury may infer the fact. Direct and circumstantial evidence differ merely in their logical relations to the fact in issue. Evidence as to the existence of the fact is direct. Circumstantial evidence is composed of facts which raise a logical inference as to the existence of the fact in issue.

The Court: There is no quarrel with that decision, except as I view it, the situation isn't present here that would make that apply here. We have direct and positive evidence, oral and in writing, that the man said he was a citizen of the United States. We have direct and positive evidence, if believed by the jury, that the man is not a citizen of the United States. Neither one of those things have been proven by circumstantial evidence or indirect evidence.

Mr. Acher: I think, your Honor, he has not been proven to be not a citizen. I think Mr. Davidson talked on that. He hasn't been proven not a citizen by direct evidence [159]

Mr. Davidson: If the Court please, it appears to us that the only way the jury could possibly pass upon this question as to whether or not this man is a citizen of the United States is by inference. As pointed out by the Court yesterday, the record

shows this man was born in Canada, and the Court indulged in the presumption that a citizenship once having been shown to exist continues to exist until the contrary is shown.

The Court: That is the statute, isn't it, Mr. Davidson?

Mr. Davidson: Not quite, your Honor. A thing once proven to exist continues as long as is usual with things of that nature.

The Court: Isn't it usual with citizenship that it exists until a change has been made?

Mr. Davidson: Yes, that is true, your Honor. However, may I point out this to the Court, that Section 1993 of the Revised Statutes, which was in existence at the time this man entered the United States, provides: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be, at the time of their birth, citizens thereof, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose father never resided in the United States." It is our contention, if the Court please, that the presumption could not follow by reason of that statute because there is [160] nothing in evidence to show that the defendant's father was not a citizen of the United States at the time of defendant's birth. He might have been a citizen of the United States and temporarily residing in Canada. I might call a vivid example of that to the Court's attention with respect to one of the immigrant inspectors stationed in Winnipeg, whose children were born there. They

were born citizens of the United States. So, we feel that the presumption cannot go so far as to say because he was born outside of the United States, it must necessarily be presumed he was not a citizen of the United States, because, had his father been a citizen, either by birth or naturalization, at the time of defendant's birth, then the defendant was a citizen of the United States.

The Court: As to that part of it, I am not relying on the presumption at all. To me, and I so hold, the fact that this man was born out of the United States establishes, as a matter of fact, and not by any presumption at all, him as being a Canadian citizen, and that being established that he is a Canadian citizen, then I have reference to the presumption of the continuity of citizenship.

Mr. Davidson. That is the question we had in mind. We have doubts as to that presumption being used because of Section 1993.

Mr. Acher: We have another point, your Honor. We have some cases that the presumption of innocence would overcome the [161] other presumption.

The Court: The presumption of innocence overcomes the other presumption, not as a matter of law, but if the jury so holds. Do you have any case that the presumption of innocence overcomes any other legal presumption as a matter of law?

Mr. Acher: I think the case of State v. Sanford, a New Mexico case, where the Court quoted from the United States Supreme Court case of Carver v. United States, and said— this is quoted from the Supreme Court case—"The statements of Miller

made at the later interview, if not coming within the category of dying declarations, were hearsay, and should not have been permitted to go to the jury. It was incumbent upon the state to lay the foundation for their admission as dying declarations. Defendants could rely upon the presumption of innocence, and deceased then believed he might recover." The Court in this New Mexico decision then states, "The last sentence of the foregoing quotation suggests a consideration of the rule stated by Mr. Lawson in his work on the Law of Presumptive Evidence at Page 240, as follows: 'In the case of conflicting presumptions the presumption of the continuance of things is weaker than the presumption of innocence.' An examination of the authorities relating to the rule that the existence of a state of facts or condition once proven to exist continues, is ordinarily invoked in civil cases only. In our opinion, in accordance with the view expressed by Professor [162] Lawson, and also by Judge Blanchard in State v. Sadler, the so-called presumption should be sparingly applied in a case where the life or liberty of an accused is at stake."

Court: How can you sparingly apply it? It would be error for the Court to charge the jury on the continuity of things because the presumption of innocence is there entered. How do you justify the language that it should be sparingly applied? It doesn't appeal to me. A presumption is made evidence, and I intend to charge this jury that presumptions have the force and effect of evidence, not the presumption of innocence alone, but all

presumptions, the presumption of sanity, the presumption that a sane man intends the natural and ordinary consequences of his voluntary act. One isn't of any more efficacy than the other.

Mr. Acher: Of course, in Morrison v. California, which is by Cardozo, the Court considered the Alien Land Law of California. The legislature sought to establish by law that the burden was on the Japanese to show that they were citizens. The Supreme Court held it unconstitutional, as I recall it.

The Court: If they did, they held it unconstitutional if the Japanese claimed to be born in the United States, but they never held it unconstitutional if the Japanese said he was born in Japan, and particularly in deportation proceedings, the burden then is upon the alien to establish citizenship.

Mr. Acher: I think there is a distinction. Defendant, [163] according to the record, came in legally when he was under age, and we contend that in order to support a verdict of guilty, you have to rely on the presumption of continuity overcoming the presumption of innocence.

The Court: You don't rely on any presumption. You rely on a fact. He was born in Canada. That is no presumption, it is a fact.

Mr. Davidson: Under the statute he could have been born outside of the United States and still be a citizen.

The Court: He could have been, but lawsuits are not determined by what could happen, but what did

happen. Ninety-nine and ninety-nine hundredths per cent of the people born in a nation are citizens of that nation. It is only a rare exception when one is a consular officer, or an officer of the government, or something of that kind and stationed in a foreign nation in his official capacity that the rule applies.

Mr. Acher: Going back to this other point, your Honor, there is one case from the 9th Circuit by Judge Denman, C.I.T. Corporation v. United States, 150 F(2d) 85, "The crime charged against Thomas was conspiracy to cause to be made an instrument knowing the same to be false and for the purpose of influencing the action of the Administration. Knowledge of falsity and a purpose, that is, intent to use the falsehood for such influence, is the essence of the crime. It is not sufficient to prove Thomas guilty to show that he signed a document with an [164] untruthful statement which might tend to influence the Administration. The burden on the government is to prove his knowledge of its falsity and his criminal intent so to influence the Administrator's acceptance of the borrower's note. This proof may be by circumstantial evidence, but such facts must be proved."

The Court: May be, yes. As I view it, any fact issue in a criminal case may be proved by circumstantial evidence as well as direct evidence.

Let the record show at the conclusion of all of the evidence, that both parties having rested, the Court now rules upon the request of the defendant heretofore presented to the Court for specific charges by the Court to the jury, and the Court refuses to

give the defendant's requested instruction No. 1. The Court will cover it in substance, in the opinion of the Court, in the charge of the Court itself. Is there any objection or exception to the refusal of the Court to give defendant's proposed Instruction No. 1?

Mr. Acher: We would like to except, your Honor.

The Court: Very well, exception will be entered. The Court refuses to give defendant's requested instruction No. 2. It will be covered by the Court in its charge. Is there any objection or exception?

Mr. Acher: Note our exception.

The Court: Very well. The Court will give the Defendant's [165] Requested Instruction No. 3. Has the government any objection or exception?

Mr. Pease: None, your Honor.

The Court: The Court refuses to give the Defendant's Requested Instruction No. 4. It will be covered wherever proper by the Court's charge to the jury. Has the defendant any objection or exception?

Mr. Acher: Note our exception.

The Court: The Court refuses to give Defendant's Requested Instruction No. 5. It will be fully covered in the charge of the Court to the effect the burden is upon the government to prove the guilt of the defendant beyond a reasonable doubt before the jury may convict him, and if they have any doubt whatsoever, it is their duty to find the defendant not guilty. Does the defendant have any objection or exception to the refusal of the Court to give Instruction No. 5?

Mr. Acher: Note our exception.

The Court: The Court proposes to give Defendant's Requested Instruction No. 6. Has the government any objection or exception?

Mr. Pease: None, your Honor.

The Court: The Court proposes to give the Defendants' Instruction No. 7 after deleting therefrom the words, "or the absence of intent." The defendant is presumed to be sane.

Mr. Acher: No objection. [166]

The Court: It is established here he committed an act and a sane man can't commit an act without some kind of intent, whether it is innocent intent or guilty intent.

Mr. Acher: No objection.

The Court: The Court proposes to refuse Defendant's Instruction No. 8. Where proper, it will be covered by the instructions of the Court.

Mr. Acher: Note our exception.

The Court: The Court proposes to refuse to give Defendant's Instruction 9. Where proper it will be covered by the Court's charge.

Mr. Acher: Note our exception.

The Court: The Court proposes to refuse to give Defendant's Instruction 10.

Mr. Acher: Note our exception.

The Court: The Court will refuse to give Instruction No. 11.

Mr. Acher: Note our exception.

The Court: I think that is just a portion of the statute of the state with some of the language left out. As I recall, I think the state statute defines the

word "wilful" as implying a purpose or willingness to commit the act whether there is knowledge or something of that kind as to whether the act is criminal or not. I have forgotten the exact wording. This isn't a copy of the statute, is it?

Mr. Acher: It is an instruction we have used in some [167] other case, Your Honor; I don't have authorities cited here. No. 12 is taken from the various decisions I have cited.

The Court: Well, the Court will refuse to give proposed Instruction No. 12.

Mr. Acher: Note our exception.

The Court: The Court will refuse to give Proposed Instruction No. 13.

Mr. Acher: Note our exception.

The Court: The Court refuses to give Proposed Instruction No. 14.

Mr. Acher: Note our exception.

Mr. Acher: I think that one should be withdrawn, your Honor, I can't see any applicability——

The Court: Which one do you think you ought to withdraw? I certainly do not agree with the doctrine of law where it is said if a man makes a statement purporting to be a fact his statement is no evidence of the fact. If these decisions hold this, I don't intend to follow those decisions. When a may says outside of court that he is a citizen, the jury might consider he is telling the truth about that even though he says in court and under oath he is not a citizen. I am going to refuse to give it.

Mr. Acher: I think the Warzower case throws some light on that where the Court said in the War-

zower case—it is a late United States Supreme Court case in point on this, it is [168] in my brief—"Where the crime charged is a false statement and where it finds its only proof in admissions to the contrary prior to the act set out in the indictment, it may be unlikely that a jury will conclude that the falsity of the later statement is proven beyond a reasonable doubt but such evidence justifies submission of the question to them."

The Court: I think so. Well, the Court refuses to give Defendant's Requested Instruction No. 15.

Mr. Acher: Note our exception.

The Court: Well, what do you think about Instruction 16, Mr. Pease?

Mr. Pease: I think, your Honor, it is absolutely inapplicable to the record in this case, because whether or not the government proved the motive on the part of the defendant, certainly the defense evidence itself proved the motive.

Mr. Acher: Our theory on that Instruction, your Honor, is that we have a club with three members; two of them have been shown qualified to get a license, in fact, it was assigned to one of them, which would show that the Liquor Board would have approved that particular one, and there would be no reason that this man should commit a felony to get the license. Under this Montana decision, I think——(Interrupted)

The Court: Any man charged with a crime—there is absolutely no reason, as far as that is concerned, for any man to commit a crime. Anyone else could have got the license, but they didn't. [169]

Mr. Acher: If a man robs a bank, we would assume he did want to get money.

The Court: Yes, and if a man is getting a license for a saloon that can't itself get the license, you assume he wants money too. It is all done for profit. The only thing I am in doubt about is whether or not a charge on motive is a proper charge in a criminal case. It is not necessary for the government to prove motive in order to sustain a conviction. Whether a motive is or is not established is entirely immaterial.

Mr. Pease: It seems to me also, your Honor—(interrupted)

The Court: I think I will refuse it. There may be some motive, but motive is not an element in a criminal case at all.

Mr. Pease: I would like to make a specific objection to the Instruction, your Honor. There is no definition of motive accompanying the instruction so that it would very likely be confusing to the jury so that they would confuse it with the element of intent.

The Court: Then there might have been some motive entirely unknown to the jury. Well, that is Instruction 16 that I refuse to give.

Mr. Acher: We note an exception.

The Court: I doubt the applicability of No. 17, but I am going to give it.

I am going to give Defendant's Requested Instruction No. 18. [170]

The Court: I am going to refuse to give Defendant's Requested Instruction No. 20. It will be

fully covered by the instructions of the Court, and I don't think it is proper in giving a charge to the jury to reiterate, to emphasize any particular portion of the charge.

Mr. Acher: Which one are you ruling on?

The Court: No. 20.

Mr. Acher: What happened to No. 19, your Honor? It is conjectures and surmises.

The Court: Well, we will get to that. I don't know where that is. Well, Defendant's Instruction No. 19 is refused. The Court intends to charge the jury as set out in that instruction, but close after the word "true," but I deny the instruction as given or offered.

Mr. Acher: Your Honor, I wonder if we could discuss the first portion of it in the argument up to the point you have indicated?

The Court: Yes, any instruction I have indicated I am going to give you can discuss in the argument.

The Court refuses to give Defendant's Proposed Instruction 21.

Mr. Acher: Note our exception. And did the record show that No. 20 is refused? I interrupted there, and I am not sure.

The Court: I did refuse to give No. 20 [171]

Mr. Acher: Note our exception to the refusal to give No. 20.

The Court: The Court refuses to give Instruction No. 23.

Mr. Acher: Note our exception.

The Court: The Court refuses to give Instruction No. 24.

Mr. Acher: Note our exception.

Mr. Angland: No 22 was missed.

The Court: Well, I will give Instruction 22. That seems to be the statute of the state. I think the District Attorney should do a little research and copy some of the statutes of the state that are applicable and tender them to me, that an alien is not qualified to possess a liquor license; another one that clubs such as this are not themselves qualified to hold a liquor license unless it has been incorporated for a year or two years, whatever the time might be.

Mr. Angland: That is in this one, your Honor. I see that in the middle of the page here, your Honor, starting about line 19, the definition of club.

The Court: Oh, yes.

Mr. Angland: The one here applies to the beer license and not to the liquor license and would serve only to confuse the jury.

The Court: Well, the Court will refuse to give Instruction 25. There is absolutely no basis in the evidence to justify a giving of any such instruction.

Mr. Davidson: Note an exception.

The Court: The Court will refuse to give Instruction No. 26. There is no basis in the evidence that would support the giving of the instruction, in the opinion of the Court.

Mr. Davidson: Note an exception.

The Court: The Court has marked on the instructions refused the word "refused," and on the instructions it proposes to give the word "given."

Instructions offered by the defendant and given by the Court are as follows:

Defendant's Requested Instruction No. 3

You are instructed that the defendant in this case is not required to prove anything. The burden rests upon the plaintiff, United States of America, to prove to your satisfaction, beyond a reasonable doubt, each and every element necessary to constitute the crimes charged in each count of the indictment herein, and if after considering all of the evidence in the case, together with the presumption of inocence, you have a reasonable doubt as to the existence of one or more of these elements, your verdict must be not guilty. At no time does it dissolve upon the defendant to prove his innocence or even to raise a reasonable doubt in your minds as to his guilt, but the burden is at all times upon the United States of America to prove beyond a reasonable doubt that the defendant is guilty as [173] charged in the indictment, and if that has not been done, your verdict must be not guilty.

Given.

R. LEWIS BROWN,
Judge.

Defendant's Requested Instruction No. 6

The jury are instructed, that in every crime or public offense, there must be a union or joint operation of act and intent, and both of these elements, viz., act and intent, must not only exist, but must be proven in this case to the satisfaction of your minds, beyond a reasonable doubt, else you must find the defendant not guilty.

Given.

R. LEWIS BROWN,
Judge.

Defendant's Requested Instruction No. 7

The intent with which an act is done may be inferred from the attendant circumstances; but, when the circumstances are such as to furnish the basis for an inference of some intent other than that necessary to constitute the particular crime charged (or the absence of any intent), a verdict of guilty of the crime charged cannot be sustained.

Given.

R. LEWIS BROWN,
Judge.

(The phrase enclosed in parenthesis was deleted by the Court.) [174]

Defendant's Requested Instruction No. 17

You are instructed that evidence of oral admissions of a party is to be viewed with caution.

Given.

BROWN,
Judge.

Defendant's Requested Instruction No. 18

No juror should surrender his deliberate, conscientious convictions merely at the behest of a majority of the jurors or for the sake of unanimity, but as long as any juror has a reasonable doubt as to the guilt of the defendant, such juror should continue to vote not guilty.

Given.

BROWN,
Judge.

Defendant's Requested Instruction No. 22

You are instructed that the laws of the State of Montana provide as follows:

Section 2815.34 provides:

"Any club desiring to possess or have for sale beer under the provisions of this act shall make application to the Board for a permit so to do, accompanied by the license fee herein prescribed. Upon being satisfied from such application, or otherwise, that such applicant is qualified as herein provided, the Board shall issue such license to such club, which license shall be at all times prominently displayed in the club premises. [175] If the Board shall find that such applicant is not qualified, no license shall be granted and such license fee shall be returned. The Board shall have the right at any time to make an examination of the premises of such club and to check the alcoholic content of beer being kept or sold in such club."

Section 2815.37 provides:

"No club shall be granted a license to sell beer:

(a) If it is a proprietary club or operated for pecuniary gain.

(b) Unless such club was established as such club for at least one (1) year immediately prior to the date of its application for a license to sell beer."

Section 2, Chapter 84, Laws 1937, provides in part:

"'Club' means a national fraternal organization, except college fraternities, or an association of individuals organized for social purposes and not for profit, with a permanent membership and an existence of two years prior to making application for license with permanent quarters or rooms."

"'Person' means every individual, co-partnership, corporation, hotel, restaurant, club and fraternal organization, and all licensed retailers of liquor, whether conducting the business singularly or collectively."

Section 3, Chapter 84, Laws 1937, provides:

"The Montana liquor control board is hereby empowered, authorized and directed to issue licenses to qualified applicants [176] as herein provided, whereby the licensee shall be authorized and permitted to sell liquor at retail, and upon the issuance of such license the licensee therein named shall be authorized to sell liquor at retail but only in accordance with the rules and regulations promulgated by the said board and the provisions of this act. Qualified applicants shall include persons, hotels, clubs, fraternal organizations and railway systems."

Section 9, Chapter 84, Laws 1937, provides:

"No person shall be granted more than one license in any year. No person, club, or fraternal organization shall be entitled to a license

under this act unless such person, club, or fraternal oganization shall have a beer license issued under the laws of Montana."

Given.

BROWN,
Judge.

Instructions offered by the defendant and refused by the Court are as follows:

Defendant's Requested Instruction No. 1

To this indictment the defendant had pleaded not guilty, and under that plea he denies every material allegation of the indictment against him. No presumption is raised by the law against him, but every presumption of law is in favor of his innocence, and in order to convict him of the crime charged against him every material fact necessary to constitute such crime must be proven by the government by competent evidence, beyond a reasonable doubt; and if the jury entertain any reasonable doubt upon any fact or element necessary to constitute the crime charged, it is your duty to give the defendant the benefit of such doubt and acquit him.

Refused.

R. L. B.,
Judge.

Defendant's Requested Instruction No. 2

You are instructed that the Defendant comes into Court protected by the presumption of law that he is innocent of any crime, and particularly the crime charged against him in the indictment. The defend-

ant is presumed to be innocent until his guilt is established beyond a reasonable doubt. This presumption attends him at every step and throughout the entire case, and to its benefits he is entitled in deciding every question of fact. That he has been suspected and charged with the perpetration of a crime does not in any degree tend to show his guilt or remove from him this presumption of innocence which the law throws about him. The indictment in this case is only a formal written accusation of crime required as an essential preliminary to a trial, but in itself is not any evidence of crime. It is merely a formal charge for the purpose of putting the defendant upon trial and should not influence you in arriving [178] at your verdict, nor should it be allowed to in any way prejudice you against the defendant, but you should determine his guilt or innocence by a careful consideration of all the evidence introduced in the case during the trial.

Refused.

R. LEWIS BROWN,
Judge.

Defendant's Requested Instruction No. 4

A reasonable doubt is not such a doubt as a man may start by questioning for the sake of a doubt, nor a doubt suggested or surmised without foundation in the facts or testimony. It is such a doubt only as in a fair, reasonable effort to reach a conclusion upon the evidence, using the mind in the same manner as in other matters of the highest and gravest importance, prevents the jury from coming to a conclusion in which their minds rest satisfied.

If so using the mind and considering all of the evidence produced, it leads to a conclusion which satisfies the judgment and leaves upon the mind a settled conviction of the truth of the fact it is the duty of the jury to declare the fact by their verdict.

It is possible always to question any conclusion derived from the testimony, but such questioning is not what is termed a reasonable doubt. A reasonable doubt exists only in that state of the case which after the entire comparison and consideration [179] of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

Refused.

R. LEWIS BROWN,
Judge.

Defendant's Requested Instruction No. 5

Where, in the consideration of the evidence in a criminal case, the jury concludes that upon such evidence it cannot say whether the defendant is guilty or not guilty, then it is the duty of the jury to return a verdict of not guilty.

Refused.

R. LEWIS BROWN,
Judge.

Defendant's Requested Instruction No. 8

You are instructed that under the first and second counts of the indictment the defendant is charged with having knowingly, falsely, and feloniously rep-

resented himself to be a citizen of the United States without having been naturalized or admitted to citizenship or without otherwise being a citizen of the United States.

Under this charge the Government must prove beyond a reasonable doubt:

First: That the defendant in an application for a retail liquor license at the time and place referred to in the Indictment [180] did state that he was a citizen of the United States.

Second: That the defendant was not a citizen and that therefore the statement was untrue.

Third: That the defendant did not believe he was a citizen when he so stated, if he did so state, and that said statement was made knowingly, falsely and feloniously as those words are elsewhere defined in these instructions.

All three of the foregoing elements must be proved beyond a reasonable doubt, and if you have a reasonable doubt as to any one of the foregoing matters you must acquit the defendant.

Refused.

BROWN,
Judge.

Defendant's Requested Instruction No. 9

You are instructed that under the third count of the indictment the defendant is charged with having wilfully and knowingly, under oath testified falsely that he was a citizen of the United States whereas the defendant was not a citizen as he well knew.

Under this charge the government must prove beyond a reasonable doubt.

First: That the defendant testified that he was a citizen.

Second: That the defendant was not a citizen and that therefore the statement was untrue.

Third: That the defendant did not believe that he was a [181] citizen when he so testified, if he did so testify, and that the testimony was given knowingly, falsely, wilfully and feloniously as those words are elsewhere defined in these instructions.

All three of the foregoing elements must be proven beyond a reasonable doubt, and if you have a reasonable doubt as to any one of the foregoing elements of the crime charged you must acquit the defendant.

Refused.

R. LEWIS BROWN,
Judge.

Defendant's Requested Instruction No. 10

The word "feloniously" is descriptive of the act charged. To establish that an act was done feloniously it must be shown that the act was done with a mind bent on doing that which is wrong, or, as it has been sometimes said, with a guilty mind.

Refused.

BROWN,
Judge.

State v. Connors,
37 Mont. 15, 94 P. 199;
State v. Rechnitz,
20 Mont. 488, 491, 52 Pac. 264.

Defendant's Requested Instruction No. 11

You are instructed that the word "wilful," when applied to the intent with which an act is done or omitted, implies a purpose or willingness to commit the act. It means intentionally; [182] that is, not accidentally.

Refused.

BROWN,
Judge.

Defendant's Requested Instruction No. 12

The word knowingly as used in this indictment means with guilty knowledge, that is deliberately and with knowledge and not something which is merely careless, or negligent or inadvertent.

Refused.

BROWN,
Judge.

Cliquot v. United States,
3 Wall 114, 18 L. Ed. 116;
U. S. v. Ill. Cen.,
303 U. S. 239, 82 L. Ed. 777;
Brouder v. U. S.,
312 U. S. 335, 85 L. Ed. 862.

Defendant's Requested Instruction No. 13

The word "falsely" as used in this indictment means something more than an untruth and includes perfidiously or treacherously or with intent to defraud.

Refused.

R. LEWIS BROWN,
Judge.

U. S. v. Achtner (CCA2) 144 F (2nd) 49.

Defendant's Requested Instruction No. 14

The Court charges you that before you can convict on circumstantial [183] evidence the circumstantial evidence must be consistent with the guilt of the defendant upon trial and inconsistent with his innocence, and the evidence must be so strong, clear and conclusive as to the guilt of the defendant as to remove every other reasonable hypothesis except the defendant's guilt.

Refused.

BROWN,
Judge.

Defendant's Requested Instruction No. 15

You are instructed that when a witness has been contradicted by showing that he made inconsistent statements at another time, the previous contradictory statements are not evidence of the facts related in such statements. The fact that the witness has made contradictory statements may be considered by you in considering the credibility of the witness, but the subject matter of the previous contradictory statements inconsistent with his testimony on the trial cannot be considered as evidence of the facts stated in such previous statements.

Refused.

BROWN,
Judge.

Stevens v. Woodmen of World, 105 M. 121;
State v. Trayer, 109 M. 277;
Wise v. Slagg, 94 M. 321. [184]

Defendant's Requested Instruction No. 16

You are instructed that if the evidence fails to show any motive on the part of the accused to commit the crime charged in the indictment, this is a circumstance in favor of his innocence which the jury ought to consider, together with all the other facts and circumstances, in making up their verdict.

Refused.

BROWN,
Judge.

State v. LaSing, 34 M, 31, 39.

Defendant's Requested Instruction No. 19

You cannot find the defendant guilty in this case upon conjectures, however shrewd, nor upon suspicions, however well grounded, nor upon probabilities, however strong and convincing they may be, but only upon evidence which establishes his guilt beyond a reasonable doubt, that is upon proof such as logically compels the conviction that the charge is true and if the evidence presented to you by the government in this case goes only so far as to create in your minds conjectures, suspicions or probabilities as to the guilt of the defendant, then your verdict should be not guilty.

Refused.

BROWN,
Judge.

State v. Konan, 84 Mont. 255. [185]

Defendant's Requested Instruction No. 20

The Burden is not upon the defendant to prove that he is a citizen of the United States; upon the contrary the burden is upon the government to prove that the defendant is not a citizen of the United States.

If you find from the evidence that the government has failed to prove that the defendant is not a citizen, or you have a reasonable doubt as to whether or not the government has proved the defendant to be an alien, then you must acquit the defendant.

Refused.

BROWN,
Judge.

Defendant's Requested Instruction No. 21

You are instructed that under the third count of the indictment each essential element of the case must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances, and it is not sufficient where the testimony of two witnesses are relied upon that each of the witnesses testified to different elements of the crime charged, but the law requires in such case that two witnesses testify to each of the essential elements of the crime charged or that one witness has testified directly to such element and that the testimony of such witness is corroborated by the circumstances.

It is therefore necessary for you to understand what is [186] meant by the word "corroborate" and

"corroboration." To corroborate means to strengthen; to make more certain; to add weight or credibility to a thing; to confirm by additional security; to add strength. Evidence which does any of these things is evidence which corroborates, and is corroborating evidence. It does not mean facts which, independent of the evidence being corroborated, will warrant a conviction, but it is evidence which tends to prove the defendant's guilt independent of the evidence which is corroborated.

Refused.

BROWN,
Judge.

People v. Follette, 240 Pac. 518;
People v. Woodcock, 199 Pac. 565.

Defendant's Requested Instruction No. 23

You are instructed that the basic distinction between direct and circumstantial evidence is that in the former instance the witnesses testify directly of their own knowledge as to the main facts to be proved, while in the latter case proof is given of facts and circumstances from which the jury may infer other connected facts which reasonably follow, according to the common experience of mankind.

Refused.

BROWN,
Judge.

20 Am. Jur. Sec. 270. [187]

Defendant's Requested Instruction No. 24

You are instructed that in this case the essential elements of knowledge and intent must be established, if at all, by circumstantial evidence.

Refused.

BROWN,
Judge.

Defendant's Requested Instruction No. 25

You are instructed that all children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Refused.

BROWN,
Judge.

Section 1993, Revised Statutes.

Defendant's Requested Instruction No. 26

You are instructed that the naturalization and admission to United States citizenship of a father automatically gave United States citizenship to his children under the age of 21 years lawfully admitted to and residing in the United States prior to the age of 21 years. You are further instructed that a person entering the United States prior to

June 29, 1906, is [188] presumed to have been legally admitted to the United States for permanent residence.

Refused.

BROWN,
Judge.

Sec. 2172 Revised Statutes;
Act of June 29, 1906,
C3592 Sec. 1, 34 Stat. 596.

The Court: Call in the jury. Open the argument for the government.

(Jury returns to courtroom.)

Mr. Pease made the opening argument on behalf of the government.

Mr. Acher made the opening argument on behalf of the defendant, during which argument the following transpired:

Mr. Acher: * * * was considered by Mr. Smith as an application on behalf of the Stockman's Club. (Interrupted)

The Court: Confine yourself to the evidence. No such evidence was permitted in the case. Objections were constantly sustained to that line of testimony. Confine yourself to the evidence.

Thereafter, Mr. Acher concluded his opening argument on behalf of the defendant.

(Whereupon, an adjournment was taken until 2:00 o'clock p.m., the same day, January 9, 1948, at which time the following proceedings were had:)

Mr. Acher: If the Court please, in connection with my [189] argument and interruption by the Court, I have had a transcript prepared and submitted to your Honor. I would like to note an exception to the Court's remarks in view of the record.

The Court: Well, yes, you may have an exception to the Court's remarks, but the Court's remarks will stand. The answer of the witness was that he "told Sherman Smith and also Mr. Buley the Stockman's Club could not hold a liquor license because it had not been organized prior to two years before making application. That is the answer of the witness. It forms no basis for your argument that it was considered by Mr. Smith as an application on behalf of the Stockman's Club. Mr. Smith never said that, it wasn't contained in his answer, so your argument was not based on the evidence. You may have an exception to the remarks made to your argument, and to the remarks I make now in the presence of the jury. Conclude the argument for the defense.

Mr. Davidson made the closing argument on behalf of the defendant.

Mr. Angland made the closing argument on behalf of the government.

The Court: Well, ladies and gentlemen of the jury, the case is at the stage now where it comes to you and I for decision. I say you and I advisedly because it takes both of us to decide this case. Your oath as jurors that you have taken is that you will well and truly try the case and a

true verdict render in [190] accordance with the facts and the law as given to you by the Court; so you see each one of us plays a part in the decision of this case and the ultimate result as to the innocence or guilt of the defendant. You find the verdict. You must know before you can intelligently find the verdict what the facts in the case are, and that depends, of course, upon the testimony that you hear here, upon witnesses, their character and whether you believe them or not, and you are the sole and exclusive judges of the credibility of the witnesses and the weight to be given to their testimony, as to who of them you intend to believe, and you are the sole and exclusive judges of what the facts are in this case. I have nothing to do with that; your judgment as to the facts, as to the witnesses, binds me and controls, and I do nothing about it.

However, you could not return an intelligent verdict by knowing only what the facts are. You must also know what the law is, and I must decide that; I must decide that in advance of your retiring to the jury room, because you must know what the law is before you return your verdict, before you decide, and I must give it to you.

Now, as to that, I am the sole and exclusive judge of what the law is. That is my function here. I have the right to charge you as to what the law is, and I intend to do that, and under your oath, you must accept the law as I give it to you as the law in this case, and you can have no different idea [191] at all except as I give it to you; and

then apply the law as I give it to you to the best of your ability to the facts as you find them to be in the jury room and then return your verdict.

The defendant stands charged here by an indictment returned by the Grand Jury of three separate and distinct offenses against the laws of the United States. They are set out in writing in count one, two and three, and each of them, each one of them, if you believe them to be established by the evidence beyond a reasonable doubt, constitutes a separate offense against the laws of the United States. At the outset, I want to warn you and charge you that this indictment is not evidence in any sense of the word at all. and you are not to consider it as evidence. It does not prove or tend to prove in any degree the truth of any statement contained in this indictment, and you are not to consider it as doing that. You have no right to say to yourselves the statements must probably be true set out in there because the charge is made. You have no right to do that. It is not evidence. The indictment serves a specific purpose in the case. The law requires it to be filed and to be filed in writing so that you and I and the defendant may know just exactly with what he is charged, the specific particular charge made against him so that should he plead not guilty and demand a trial, we then can view the evidence in the light of the charge made to see whether or not the exact charge that is made has been proven, because if it isn't, why then, of course, [192] your verdict should be not guilty. The government must prove in exactitude the charge that is made against the defendant.

Count 1 of this indictment reads as follows: "On or about June 27, 1946, at Helena, in the District of Montana, and within the jurisdiction of this Court, the above named defendant, Louis Raphael De Pratu, did knowingly, falsely and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen of the United States, in that the said defendant, in an application for a retail liquor license under the laws of the State of Montana filed by him with the Montana Liquor Control Board, did state as follows: 'Are you a citizen of the United States? Answer, Yes,' whereas in truth and in fact said defendant was not then and never had been a citizen of the United States, which he, the said defendant, well knew." That is all of the first count.

The second count is in exact, identical language, except that it is said that the statement there as to his citizenship was contained in an application made on January 15, 1946, at Helena, six months before the application made in the first count, and that is the only difference.

Count 3 reads as follows: "That on or about September 11, 1946, at Sweetgrass, in the District of Montana, and within the jurisdiction of this Court, the above named defendant, Louis Raphael De Pratu, did knowingly, falsely and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship and without otherwise being a citizen of the United States in that the said defendant,

before a board of special inquiry of the Immigration and Naturalization service of the United States, having been first duly sworn as a witness, did wilfully and knowingly testify as follows, 'Question, Of what country are you now a citizen? Answer, United States. I acquired United States citizenship through my father who naturalized in the United States while I was a minor,' whereas in truth and in fact the defendant was not then and never had been a citizen of the United States, as he, the said defendant then well knew." That is the third count.

Now, of course, ladies and gentlemen, it is necessary to know whether or not, if all of those facts set out in each of those counts have been established beyond a reasonable doubt, a violation of the law has been committed, and to ascertain that, it is necessary to turn to the Acts of Congress of the United States, and we find reported as an Act of Congress in Title 8, Section 746 of the penal provisions the following: "It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, whether an employee of the government of the United States or not, (a) 18, to knowingly to falsely represent himself to be a citizen of the United States, without having been naturalized or admitted to citizenship or without otherwise [194] being a citizen of the United States." So, you see, Congress has enacted that it shall be a felony for one knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship or without

otherwise being a citizen of the United States, and that is the essence of the charge that is made in each one of these three counts. So the question then is to be determined by the evidence in the case. You now know what the law is in that regard.

Now, however, the defendant appeared in court for his arraignment last June and pled not guilty to each of the offenses set out in this indictment, and by pleading not guilty, he then immediately cast upon the government the burden of establishing to your satisfaction beyond a reasonable doubt the truth of each and every material allegation that is set out in each one of those counts before a verdict of guilty would be justified. Now, the burden isn't on the government just to establish the truth of a portion of the material allegations, but the burden is upon the government to establish the truth of each and all and every of the material allegations set out in the three counts, and if the government fails to establish any one of them, the government then, of course, has not made a case, so in analyzing the indictment and as to the material allegations that the government must establish, we turn to count one, and the government must prove beyond a reasonable doubt [195] that on June 27, 1946, in an application made to the Montana State Liquor Control Board, the defendant there recited that he was a citizen of the United States; but the government must go further than that and must prove that, although he recited that, at the time he made that representation, if you find he did in that application, that he had not been naturalized as a citizen

of the United States or admitted to citizenship and was not otherwise a citizen of the United States; so the government must prove first, that he made the statement he was a citizen, that at the time he made it, he was not a citizen, either by naturalization or admitted to citizenship in any manner known to the law of this nation; but the government must go further than that and must prove that at the time he made the statement, if he made it, that he made it knowingly, he made it falsely and he made it feloniously. The government must prove all that. If it fails to prove any one of them, then your verdict must be not guilty in the case. If it proves all of them beyond a reasonable doubt to your satisfaction, then your verdict must be guilty, and that is true as to the second count. That is equally true as to the third count, because the gist of this case, the essential elements that must be established in all three counts is that he made the representation that he was a citizen; that at the time he was not a citizen, had not been naturalized and was not a citizen and that at the time he made it, he made it knowingly, falsely and feloniously. [196]

Now, ladies and gentlemen, that question, or those elements, rather the truth or the establishment of the truth of those elements depends largely upon the testimony you have heard in the case. You have received evidence from the witnesses that you must consider, and from all of them. You have also received evidence in the form of writings that are before you. There are other things, however, that

are evidence, have the force and effect of evidence, that are in the case that do not appear in writing and that no witness has testified to on the witness stand, and those are what are known as presumptions of law; and, of course, the chief presumption of law always in a criminal case, that is, in this case, and it has the force and effect of evidence, is what is known as the presumption of innocence, and that is, the defendant comes into court presumed innocent and that presumption protects him until such time when the jury shall believe from the evidence beyond a reasonable doubt that the defendant is guilty as charged in the indictment. the guilt of an accused is not to be inferred because the facts proved are consistent with his guilt, but on the contrary before there can be a verdict of guilty, you must believe beyond a reasonable doubt that the facts proved are inconsistent with his innocence, and if two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, you should adopt the former. So your frame of mind when you start this case, start to try this case as jurors, was and must be under [197] the law that the defendant is innocent of this particular offense, and it was in order to dispel that presumption of innocence and to overcome it that the government introduced evidence in this case, and of course, when you retire to your jury room you must weigh the evidence in the case in the light of the presumption of innocence, you must keep that presumption in your mind as you view the evidence in the case, and view it with the thought that

if the defendant did that, can he be innocent, is it consistent with his innocence. If you find it is, the presumption should control. However, after you view the evidence in the case and consider it, and keeping in mind the presumption of innocence, you may finally come to the conclusion from the evidence that although all of us are presumed to be innocent and that the defendant is presumed to be innocent by the law and the law presumes him innocent in this particular case, still after I have heard all this evidence and I have considered the evidence and I cannot say and I do not believe from the evidence that I have heard and it impresses me that the defendant is not innocent, then, if you come to that frame of mind, the presumption of innocence passes out of the case because it has been overcome by evidence, and evidence may overcome it, but it takes evidence to overcome it. If you believe from the evidence that you can not consistently attribute innocence to the defendant after listening to the evidence, then the presumption passes out of the case and it is your duty to [198] return a verdict of guilty in the case. Of course, it necessarily follows that you cannot find the defendant guilty in this case upon conjectures, however shrewd, nor upon suspicions, however well grounded; nor upon probabilities, however strong and convincing they may be, but only upon evidence which establishes his guilt beyond a reasonable doubt, that is, upon proof such as logically compels the conviction the charge is true, and the reason for that is, ladies and gentlemen, that you

act on evidence; mere suspicious, probabilities and conjectures are not evidence; they do not rise to the dignity of evidence, and the burden of proof is upon the government in the case.

The government makes the charge, the government is the accuser, and, of course, it is only fair that they, having made the charge, must be in a position to establish the truth of the charge before twelve impartial, fair minded persons; and it necessarily follows from what I tell you that the defendant is not required to prove anything at all in the case. The burden rests upon the plaintiff, the United States of America, to prove to your satisfaction beyond a reasonable doubt each and every element necessary to constitute the crime charged in each count of the indictment herein, and, if, after considering all of the evidence in the case, together with the presumption of innocence, you have a reasonable doubt as to the existence of one or more of these elements, your verdict must be not guilty. [199] At no time does it devolve upon the defendant to prove him innocence or even to raise a reasonable doubt in your minds as to his guilt, but the burden is at all times upon the United State of America to prove beyond a reasonable doubt that the defendant is guilty as charged in the indictment and if that has not been done, your verdict must be not guilty. Not only is the burden upon the government, but the burden is beyond a reasonable doubt. You must be satisfied in your minds to that extent before you can return a verdict of guilty of the charge.

Now, a reasonable doubt is what the term implies. It is a doubt founded upon reason. It does not mean every conceivable kind of a doubt. It does not mean a doubt that may be purely imaginary or fanciful or one that is merely captious or speculative. It means simply an honest doubt that appeals to reason and is founded upon reason, and if, after considering the evidence in the case, you have such a doubt in your mind as would cause you to pause or hesitate before acting in a grave transaction of your own life, you have such a doubt as the law contemplates as a reasonable doubt. If, however, after considering the evidence in the case you have no such doubt in your mind as would cause you to pause or hesitate before acting in a grave transaction of your own lives, but would act unhesitatingly and without pause in such transaction, then you do not have such a doubt as the law contemplates as a reasonable doubt and the government has sustained its burden of proof. [200]

Now, there are contained in the indictment certain words that have been dwelt on in the argument, and I charge you that the word "knowingly"—it is charged he did these things knowingly—the word "knowingly" imports only knowledge that the facts existed which bring the act or omission within the provisions of the law. It does not require any knowledge of the unlawfulness of such act or omission.

The word "wilfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make

the omission referred to. It does not require any intent to violate law or injure another, or to acquire any advantage.

The word "falsely"—it is charged that the representation was made falsely—that always imports a fraud, and the word "falsely" as used in the indictment as describing the representation as to citizenship alleged to have been made by the defendant, means a representation made that is not true and that the party making it knows it is not true at the time it is made, and the party who makes it makes it at the time for the purpose of having the one to whom it is made believe it and accept it as true and act upon it as true, to the advantage and benefit of the one making it. When I say advantage to the one making it, it doesn't mean financial or monetary benefit, it means every kind of benefit which the one making it thinks will accrue to him by reason of making the statement. [201]

The word "feloniously," as used in the indictment, means that if the things were done that it is charged in the indictment that the defendant did, then the defendant was guilty of an offense against the laws of the United States constituting a felony as distinguished from a misdemeanor. A felony under the laws of the United States, is an offense committed against the United States, the punishment for which may be imprisonment in the penitentiary for a period exceeding one year, but need not necessarily be.

And I charge you that in every crime or public offense, there must be a union or joint operation of act and intent. In other words, it is not sufficient in this case to prove the act was done, the representation made, but you must also be satisfied as to the intent that existed in the mind of the defendant at the time he made it, and both of these elements, namely, act and intent, must not only exist, but must be proven in this case to the satisfaction of your minds beyond a reasonable doubt, else you must find the defendant not guilty, and the intent with which an act is done may be inferred from the attendant circumstances, but, when the circumstances are such as to furnish the basis for an inference of some intent other than that necessary to constitute the particular crime charged, a verdict of guilty of the crime charged cannot be sustained.

I charge you that the evidence of the oral admissions of the defendant is to be viewed with caution.

Of course, I have told you, ladies and gentlemen, that you have to do with the evidence, the credibility of witnesses. It is your burden to determine what the facts of the case are. However, your power of judging of the effects of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the laws of evidence, even though you are the sole and exclusive judges of the testimony and the weight and effect of the testimony. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence that satisfies your mind.

A witness false in one part of his testimony is to be distrusted in others.

Evidence is estimated not only by its own intrinsic weight, but also according to the evidence which is in the power of one side to produce and of the other to contradict, and, therefore, if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence is within the power of the party to produce, the evidence offered should be viewed with distrust.

The direct evidence of one witness entitled to full credit is sufficient for proof of any fact embodied in this case. Now, note ladies and gentlemen that I do not say that the direct testimony of one witness is sufficient for proof of any [203] fact. I do say that the direct evidence of one witness who is entitled to full credit. That is a witness who you believe absolutely is telling the truth, and if there is any such witness as that that has appeared before you on the witness stand, you have the right to accept his testimony, if you give it that credence, and decide the fact in accordance with his testimony, and it makes no difference how many witnesses may have testified to the contrary. In other words, the facts in issue in a lawsuit are determined not only by the quantity and number of witnesses that appeared on one side, but by the quality, and, of course, it is for you to say where the quality lies.

A witness is presumed to speak the truth, and that means this: You observed that each witness is sworn before he is permitted to go on the witness stand and testify, and when he took the oath that

he did to truly testify, the law presumes and I presume, and you must presume that he intends to obey his oath and tell the whole truth in this case. That is a presumption of law. It is what we know as a rebuttable presumption, because this presumption may be repelled by the manner in which he testifies, so that is the reason that witnesses are brought before you so you can observe them on the witness stand and see their attitude and conduct and demeanor while giving their testimony, while being questioned and interrogated, and judge not only from what they say, but how they say it, whether they are or are not trying to tell the truth, the whole truth [204] and nothing but the truth. So that is the reason why it is required of you when you are serving here to use two of your faculties, that is, the faculty of hearing to hear what the witness says, and your faculty of eyesight to determine how he says it and the manner in which he says it, because each is important to you in making up your mind whether or not you intend to believe that witness.

Now, the presumption that he is telling the truth may be repelled by the character of his testimony, that is, does it seem to you from your common experience you have had as men and women in daily contact with others over many years that those things ordinarily do happen, or does it appear to you from your experience that such things that the witness purports to say happened probably never happened. That is what is meant by the character of his testimony.

Now a witness is presumed to speak the truth and that presumption may be repelled by his motives. So, you have a perfect right when a witness is on the witness stand to view him with the thought in mind, does he have a motive, some reason, for giving the testimony he has given? Is there any reason that he might be influenced in his testimony or not tell the entire truth because of malice or ill will against the defendant, or, on the other hand, might he be influenced in giving his testimony, in not telling the whole truth, by some affection that he may have for the defendant; and if you feel there is a motive that any witness has for giving the character of testimony that he did give, and it might influence him not to truthfully testify, of course, you take that into consideration in weighing the testimony the witness gives, in judging his credibility and determining how much, if any, of it you are going to believe.

Or the presumption that the witness is presumed to speak the truth may be repelled by contradictory evidence, that is, if one witness gets on the witness stand and tells you that certain situations or facts exist, and another witness tells you that a certain situation or facts exist that are diametrically contradictory, that is contradictory evidence. Both can't be true, and you don't indulge the presumption that both of them are speaking the truth, you must decide which of the two you intend to believe.

Now, not only do you accept the witnesses' testimony and spoken word and you consider that, but you are also compelled to consider as evidence in

the case the inferences that you believe are naturally and logically to be drawn from his spoken words, what his spoken word means, that is evidence. An inference is a deduction which the reason of the jury makes from the facts proved, without an express declaration of law to that effect. An inference must be founded on a fact legally proved, and on such a deduction from that fact as is warranted considering the usual propensities or passions of men, the particular [206] propensities and passions of the person whose act is in question, the course of business or the course of nature.

Now, ladies and gentlemen, of course, it is charged in the first two counts that this representation was made in applications made to the State Liquor Control Board, and that necessarily or properly brings into this case some of the laws of the State of Montana which you should be informed about, and section 2815.34 of the Revised Codes of Montana provides that "Any club desiring to possess or have for sale beer under the provisions of this act shall make application to the Board for a permit so to do, accompanied by the license fee hereinafter prescribed. Upon being satisfied from such application or otherwise that such applicant is qualified as herein provided, the Board shall issue such license to such club, which license shall be at all times prominently displayed in the club premises. If the Board shall find that such applicant is not qualified, no license shall be granted and such license fee shall be returned. The Board shall have the right at any time to make an examination of the premises of

such club and to check the alcoholic content of beer being kept or sold in such club."

Section 2815.37 provides that "No club shall be granted a license to sell beer, (a) if it is a proprietary club or operated for pecuniary gain, (b) unless such club was established as such club for at least one year immediately prior to the date of its application for a license to sell beer." [207]

Section 2, Chapter 84, Laws of 1937 of Montana provides in part: " 'Club' means a national fraternal organization, except college fraternities, or an association of individuals organized for social purposes and not for profit, with a permanent membership and an existence of two years prior to making application for license with permanent quarters or rooms.

" 'Person' means every individual, co-partnership, corporation, hotel, restaurant, club and fraternal organization, and all licensed retailers of liquor, whether conducting the business singularly or collectively."

Section 3, Chapter 84, Laws of 1937 provides that "The Montana Liquor Control Board is hereby empowered, authorized and directed to issue licenses to qualified applicants as herein provided, whereby the licensee shall be authorized and permitted to sell liquor at retail, and upon the issuance of such license the licensee therein named shall be authorized to sell liquor at retail but only in accordance with the rules and regulations promulgated by the said board and the provisions of this act. Qualified applicants shall include persons, hotels, clubs, fraternal organizations and railway systems."

Section 9, Chapter 84, Laws of 1937 provides that "No person shall be granted more than one license in any year. No person, club, or fraternal organization shall be entitled to a license under this act unless such person, club, or fraternal organization shall have a beer license issued under the laws of Montana.

You notice, as I read through those statutes, ladies and gentlemen, and running through all of them is the wording that the State Board is only permitted to issue licenses to qualified applicants, not to all, but only qualified applicants.

Further, there is a limitation upon the right of the State Board to issue, and of individuals to hold, and among the qualifications that are prescribed by the legislature of the State of Montana that one must possess in order to lawfully permit the Liquor Control Board to issue a license and that individual to possess it, is found in another section of the laws of Montana which provides that no license shall be issued by the Board to a person who is not a citizen of the United States, and who has not been a citizen of the State of Montana for at least five years. That is one of the qualifications set out by the legislature, and one may not lawfully possess or own or hold or have issued to him a liquor license unless he is a citizen of the United States and has been a citizen of Montana for at least five years.

Then the question, or problem, rather, before you is to consider the evidence in the case to determine whether or not the essential allegations of the indictment have been proven, not to consider just the

testimony that was given on behalf of the government, or just the testimony given on behalf of the defendant, but all the testimony, because it is all evidence [209] in the case, and it makes no difference who produced it here, if you hear it here, it is all evidence; and, of course, ladies and gentlemen, one of your first duties will be to separate the wheat from the chaff, because it often is, and probably is in this case, that much has been said and done and spoken that has no particular bearing on the case, that serves no purpose, other than to possibly becloud something that may have a particular bearing on the case.

Now, the ultimate fact to be proven here, as charged in the indictment is this, and that simply means, as I have told you, whether or not this man made a representation that he was a citizen, whether that was false, as I defined the word to you, whether he knew it was false, and whether he did it wilfully.

It is necessary for you, of course, to examine the evidence in the case to determine that fact and the truth of the matters. You can take into consideration, for instance, you may take into consideration that the transaction out of which this prosecution arose was initiated by the defendant himself. He initiated the transaction that resulted in the prosecution by making this application to the State Liquor Control Board. He was not required to make this application; he was not required to answer any question at all, if he did not desire to do so, but for some reason and for some purpose of his own, he did make the application, and, of course, making

the application as it appears from the application and the evidence, it was [210] necessary for him to make certain statements and representations, to truthfully answer certain questions; and that was necessary because there was a limitation upon the authority of the State Liquor Control Board to issue licenses. They can only issue licenses to qualified applicants, and it is their duty as state officers to satisfy themselves before issuing a license that the applicant is qualified; and that is what they were doing here; and they have a right to do so, and to expect an honest and truthful answer will be made by the applicant to the questions asked, and that if the applicant does not know for certain the answer to a question, that the only truthful answer he can make is that he does not know, that he can't truthfully say that he does know a fact to be true, if, as a matter of fact, he does not know the fact to be true. So, as I say, the defendant initiated these proceedings. No law of the state required him to make this application. This was a voluntary act on his part.

So, you have a right to consider, ladies and gentlemen, in that regard, who the defendant is, so far as the evidence discloses; how long he has resided in this country, so far as the evidence discloses; the degree of intelligence that he has, so far as the evidence discloses; what his status in the community and in this country was during the time he was here, whether or not he was a businessman familiar with the forms and customs of business, understood business transactions, so far as the [211] evidence dis-

closes it, or whether he was someone whose lot called him into the exercise of common labor and where there would be no familiarity at all with business matters and customs on his part. You have the right to consider that. You have the right to consider, ladies and gentlemen, so far as the evidence discloses, whether or not his length of time in this country was sufficient to familiarize himself with the language that is spoken, whether or not it was a foreign language, whether or not he knew the language well enough and was of sufficient intelligence, in filling out business forms and answering questions, to choose language that would express the truth as he knew it to be, or whether or not, because of lack of education or something of that kind, he didn't know the appropriate language to use to express his thought. You have the right to consider all those things in considering what was done.

You have the right, ladies and gentlemen, and it is in evidence here uncontradicted, that he, among others, caused a corporation to be formed. You have the right to consider whether or not he knew from that what powers and authority corporations might have, whether they could own property in their own name. Now a corporation is a legal entity, separate, aside and apart from the individual stockholders; and whether or not that he knew a corporation was qualified to do business in its own name. You have the right to consider, if the evidence discloses [212] it, and while the law presumes that all of us know the law, and not, of course, holding the defendant strictly to that presumption, you have the right to

consider whether or not in making this application, and to acquaint himself with the laws of Montana, if he were in doubt, whether he procured for himself competent legal aid and competent legal advice in doing what he did.

Now, the questions here are simple. They are not hard to understand; they are couched in ordinary language that all of us understand, and there is a line where it says that the name of the applicant for this license shall be set out, should be printed, the name of the applicant. That means the name of the person applying to have the license issued to him. It couldn't have any other meaning; and over that is put L. P. De Pratu. You can consider whether he could misconstrue that in view of his 50 years residence, as his attorneys say he had, in this country and engaging in business as the evidence shows he was.

Next, the trade name which the applicant intends to call such business. That is the Stockman's Club. Now, you can consider that, because under the evidence in this case, the Stockman's Club was not a trade name. The Stockman's Club was a corporate name. That was the name of the corporation, and not a trade name. It was not any more a trade name than the name L. P. De Pratu was a trade name. Trade names are known to the law of Montana, and all a trade name is is an individual [213] operates a business under a name that does not identify himself as the owner of the business. That is not a corporation, it is not a partnership, it is the individual, and he is doing business, but he adopts what is called

a trade name. So, should I open a grocery store under the name of Brown Grocery here in Helena, that wouldn't be a trade name, because my name is Brown, my name would identify me as being the owner. But, instead of that, should I, say, open a grocery store under the name of Helena Grocery herein Helena, that would be a trade name, because that name would not identify me as being the operator or owner of the business.

Now, you may consider from the evidence and the fact that the defendant had this corporation—was one of the organizers of this corporation, whether or not he knew that the corporation was an entity separate and apart from himself. And go through these things, and go through all of these admissions that have been made here, ladies and gentlemen, and see whether or not there could be any mistake about it, or to see whether or not anyone reading this could, from the language of this application, believe that anybody else but this defendant was applying for this liquor license, and to be issued to him in his own name by the State Liquor Control Board, whether there could be any possibility of confusion about it. Read it over.

And, of course, in that connection, ladies and gentlemen, you may consider evidence that has been produced in the case on [214] behalf of the defendant himself. Now, that evidence was presented to you—you were permitted to hear it only to establish the intent with which the defendant acted at the time he acted, and, of course, the jury are just as much entitled to hear evidence that establishes

guilty intent as they are to hear evidence that establishes innocent motive, because the burden is upon the government to establish that intent, and it makes no difference whether the evidence comes from the side of the prosecution or the side of the defendant.

So, you have this situation, that the intent that you must find existed in this man is the intent that was in the defendant's mind at the time he signed these applications and caused them to be sent to the State Liquor Control Board, not some intent that was formed afterwards, but the intent he had in his mind at that time, and that is the intent that must be established here. And, if you believe beyond a reasonable doubt from the evidence in this case, that the defendant made this application in which he recited that he was a citizen, and that at that time he was not a citizen by naturalization or any other way known to the law, that he was an alien, if you believe it, and if you believe that he knew at the time he made this representation that he was a citizen of the United States he knew he was making an untruthful representation, and if you believe further that he made this representation that he was a citizen of the United States for the purpose of having the [215] State Liquor Control Board believe that he was and accept his statement as true, and, believing the statement was true, to issue him a liquor license under the laws of the State of Montana, then, if you believe those facts, the defendant is guilty as charged in count one and two, and your verdict should be guilty, because the

government has established the requisite intent, and it makes no difference, ladies and gentlemen, what his intent was—what he intended to do with the license after he got it, whether he intended to tear it up, whether he intended to give it to the Stockman's Club, or give it to somebody else or intended to use it. That is not the intent in this case you must find. That has absolutely nothing to do with it. The intent that is material here is whether or not, as I have told you, he intended to deceive the State Liquor Control Board into believing he was a citizen and thus issue a liquor license to him.

Now, as I view the evidence, ladies and gentlemen, in the case, why it seems to me from the testimony, if the testimony of the defendant's witnesses are to be believed, that there can't be any question of the intent that the State Liquor Control Board would issue this license to him. That is the way I view the evidence. However, of course, you are the sole and exclusive judges of the evidence, that is for you to say whether he did or whether he didn't, and if you don't view the evidence as I do in that regard, it is not only your right, but it [216] is your duty to disagree with me, and to return a verdict in accordance with the way you view the evidence. But it is said here in the first place, it is proven that this corporation, this club, was not a qualified applicant under the laws of the State of Montana to receive a liquor license because it hadn't been in existence two years prior to the 27th day of June, or two years prior to the 15th day of January. It was incorporated

on the 14th day of October, 1944, and it could not become a qualified applicant for a liquor license until the 14th day of October, 1946, and it is said here, as I understand the testimony, the testimony of the witness is that the Stockman's Club, although not a qualified applicant, it desired to do business, to sell liquor, and it is said here, as I understand the testimony of the defendant's witnesses themselves, that the defendant knew that, that in order to do business that he applied for a liquor license himself, and was to hold it for the two years until the Club became qualified. So, what does that lead to? There had to be a liquor license issued under the laws of the State before the Club could legally sell liquor. They had to get it through deceit on behalf of the defendant because the Club could not hold a license, and he, as an incorporator, as a director, a stockholder and part owner of the corporation with two others, desired this business to be done and to do it under any circumstances. Now, how, if it is said he thought, or if it could be said he thought that he was applying [217] for this liquor license for the Stockman's Club, how could that be maintained in one breath, when it was said he knew the State Board would not issue the license if applied for in the name of the Stockman's Club; and, of course, that testimony disclosed, as I view it, although, of course, this is for you—I am talking evidence now and it is for you—that he did know that a corporation could legally apply in its own name for a liquor license and could be issued a license if it were qualified under the laws of the

state at that time; and, of course, the question might suggest itself, that after one had gone to the trouble and expense of incorporating a corporation that could do business in its own name for the purpose of doing this business, why, if that were the case and the thing were an honest transaction, the application should be made in the name of the corporation and the license issued in the name of the corporation as the owner because the corporation would be the owner of the license.

Now, of course, you have a right to consider the statements and representations that he made prior to this time with reference to his citizenship—the writing is in evidence—to consider the Alien Registration form where he says that he was born in Canada. Having been born in Canada, that fixed his status, ladies and gentlemen, as a Canadian citizen, and, insofar as American citizenship was concerned, an alien, and there is no presumption that any alien acquires citizenship or any [218] right of citizenship because of continued long residence in the United States, there is no such presumption as that at all. So, if his statement were that he was born in Canada, and the other evidence in this case is true and believed by you, that establishes that he is a Canadian citizen and thus an alien as far as citizenship in the United States is concerned. He says "I am a subject or citizen of what country: Uncertain, but last of Canada." Now, then, you can again consider, so far as the evidence shows, his intent, and whether or not he was sufficiently acquainted with the language to

make his thoughts in that regard clear, and you may consider in that regard whether or not, where he says that his citizenship is uncertain, that is any claim that he believes himself to be an American citizen, or any expression of any thought that he believes himself to be an American citizen, and, if there is any uncertainty in the writing, you may consider the fact that the writing was made by him, and if you find that he had sufficient intelligence and knowledge of the language to choose words which would express thoughts and ideas, but, rather than doing that, he chose words that injected uncertainty into the matter, you, of course, may consider the reason, if any, you think he had for doing those things.

Now, no juror—you should not surrender, and none of you should surrender, your deliberate conscientious convictions merely at the behest of a majority of the jurors or for the [219] sake of unanimity, but so long as any juror has a reasonable doubt as to the guilt of the defendant, such juror should continue to vote not guilty, and on the other hand, so long as any juror has a conviction that the evidence has established the guilt of the defendant beyond a reasonable doubt, so long as he retains that conviction, it is his duty to vote guilty, and your duty in that respect, ladies and gentlemen, when you retire to your jury room, and you will do this, you will discuss all of the facts of the case of importance among all of you and each one of you who desires to do that has a right to do that at the proper time. You will then take a vote. If

there is a difference of opinion, it calls for further discussion, and if the difference of opinion remains, it calls for further discussion, and the matters of difference, if any, remaining should be further discussed, and the discussion should be carried on with the frame of mind "Well, maybe the other fellow is right. I am going to keep my mind open and see." In other words, you don't close your mind to the other fellow's contention. And should it come down to it, you have the right to say, "Well, is it reasonable that they are all wrong and I am right," because usually several minds are more apt to come to a just conclusion than one. But if, after you do all those things, you keep an open mind, there are these discussions, and you are not convinced by their argument, of course, it is your duty to vote your absolute conviction, whichever way it may be.

Now, ladies and gentlemen, it requires all 12 of your number to arrive at a verdict in this case, it must be your unanimous decision. When you, all 12 of you, have arrived at your verdict, the man or woman whom you have appointed as foreman of your jury when you first have gone into your jury room, will sign the verdict and you will be returned into court, and in that connection, ladies and gentlemen, you will keep in mind that each one of the counts constitutes a separate and distinct offense against the laws of the United States, and the defendant's guilt or innocence of each one of them should be determined separately and not all lumped together. Definite forms of verdict will be given to you so that if you should find the defendant

guilty on some of the counts and not guilty on some of the others, your verdict should so reflect, and if you find him guilty or not guilty on all of them, your verdict should so reflect and those forms will be given to you.

But remember this, ladies and gentlemen, insofar as the question of intent must be determined in this case, it is, as I told you, it is the intent the defendant had in applying for that license, and what he intended that the proper authorities of the State Liquor Control Board of the State of Montana would do as a result of his filing that application with regard to issuing to him in his name a license, and there is not any question of any intent that he might have as to what he would do with the license after he had got it. [221]

The case is not finally submitted to you, ladies and gentlemen. There are matters which must come before me. Step out into the hall momentarily and hold yourselves in readiness to return into Court.

(Jury retires from courtroom.)

The Court: Does the government have any objection or exception to the charge?

Mr. Pease: The government has none.

The Court: Does the defendant?

Mr. Acher: We wish to except to the Court's charge on the word "knowingly," and in addition to the offered instruction, I would like to call attention to the case of Price v. U.S., 165 U.S. 311, where it says, "Evil intent or bad purpose in doing such thing is the element."

The Court: Well, I am satisfied with the definition of the word—was it wilfully or knowingly?

Mr. Acher: It was the word knowingly.

The Court: Your exception is granted. I am satisfied with the charge.

Mr. Acher: On the word, "Falsely," we except to the charge as failing to include as a part of the significance of the word a fradulent or criminal intent.

The Court: I said the word "falsely" involved fraud.

Mr. Acher: Perhaps, I was following it and I thought—maybe my recollection is wrong. [222]

The Court: Maybe you better go ahead and take an exception.

Mr. Acher: I just want to call attention to another case, that it requires a fradulent or criminal intent, 31 Federal 68, U.S. v. Otis.

The Court: Don't you think if one deliberately misstates a fact that he knows to be untrue for the purpose of having another accept it and act on it is criminal intent if the law makes it so?

Mr. Acher: That is what we objected to, your Honor, the fact that a civil definition would not be sufficient. It is our contention—(interrupted)

The Court: It is not a civil definition, or if it is, it applies equally to the criminal law.

Mr. Acher: It is the rule followed in estoppel.

The Court: I think fraud is fraud whether it is in civil court or criminal court, and that is simply a definition of fraud.

Mr. Acher: In connection with the instructions, we except to the definition of the word "feloniously" as given in the charge, but we haven't offered an instruction based on the Montana statute.

The Court: You say there is a Montana statute?

Mr. Acher: A Montana decision, two Montana decisions.

The Court: Very well.

Mr. Acher: We except to the language of the Court that the [223] direct evidence of one witness entitled to full credit is sufficient to prove any fact in this case upon the ground that count 3 contemplates a charge of making false statements under oath, and under the authority of Fotie v. United States, 137 Federal second, 831, which distinguishes the Warszower United States Supreme Court case—(interrupted)

Court: Wasn't that a perjury case?

Mr. Acher: They said it was a false statement and I am preserving the record. That is perjury in that they said it was a false—(Interrupted)

The Court: You have preserved it sufficiently. If I considered he was charged with perjury under the third count, I would have granted the motion to dismiss, but, as I view it, there is no charge of perjury and he has not been prosecuted for perjury.

Mr. Acher: We except to the language of the Court to the effect that it is suggested that the defendant knew the club could not get a license when the application was filed.

The Court: It was your opening statement to the jury, that has been your contention all the way through. It was your opening statement to the jury that the corporation could not get a license, and the defendant knowing that made arrangements to get the license.

Mr. Acher: I understood he filed the applications for the club and they wouldn't issue it to the club, and my offers of [224] proof were designed to show that nevertheless the Board did issue it to him.

The Court: You know, as a matter of law, the Board couldn't do anything else but what it did do because the corporation was not qualified.

Mr. Davidson: May we have an exception to the language of the charge to the effect that the defendant having been born in Canada that makes him a citizen of Canada and that he is an alien?

The Court: That is true, and I limited that in my instructions to under the facts in this case, and I did that because of your argument that he said his father was an alien and that he obtained citizenship through his father's naturalization.

Mr. Davidson: For the purpose of the record we might cite section 1993 of the revised statutes.

The Court: What is that section? I don't have that section. What is that section, derivative citizenship?

Mr. Davidson: No, it is citizenship by birth.

The Court: Well, if that is the case, if there is any such contention as that, then his statement that

he obtained citizenship because of his father's naturalization in the United States was a false statement under oath.

Mr. Davidson: No, your Honor, they are consistent.

The Court: If he is born a citizen, how can he obtain citizenship through his father's naturalization, how can there be [225] any consistency?

Mr. Davidson: Because if the father was a naturalized citizen at the time of his birth, he would be a citizen of the United States, or if his father became a citizen at any time prior to the time the son was 21, if he were residing in the United States, he became a citizen.

The Court: Your theory, as I view it, all the way through is he came over here when he was under the age of 21—it is a matter of no importance, I am not going to change the charge. Call in the jury.

(Jury returns to the courtroom.)

The Court: Swear the bailiffs, Mr. Walker.

(Bailiffs sworn.)

The Court: Well, ladies and gentlemen, the case is now finally submitted to you for your consideration and decision. The first thing you will do when you retire to your jury room is to elect one of your number foreman and commence your deliberations. You will now retire in charge of the bailiffs to your jury room. The exhibits received in evidence and the indictment will be sent in to them, Mr. Walker.

In the District Court of the United States,
District of Montana

United States of America,
State of Montana—ss.

I, John J. Parker, Official Court Reporter in the District Court of the United States, District of Montana, Butte Division, do hereby certify that the foregoing annexed transcript is a true and correct record of the proceedings had in Criminal Action No. 6747, United States of America, Plaintiff, vs. Louis Raphael De Pratu, Defendant, before the Honorable R. Lewis Brown sitting with a jury, in the Federal Building at Helena, Montana, on January 7th, 8th and 9th, 1948.

/s/ JOHN J. PARKER,
Official Court Reporter. [227]

Thereafter, on February 9, 1948, the defendant filed a Statement of Points herein, being in the words and figures, following, to wit:

[Title of District Court and Cause.]

STATEMENT OF POINTS

Comes now the defendant and appellant and makes the following statement of the points on which he intends to rely on the appeal.

1. The motions for the dismissal of the three several counts of the indictment upon the ground that the same failed to charge offenses against the laws of the United States should have been granted.

2. The court erred in denying the motion of the defendant for a Bill of Particulars.

3. The motion of the defendant for orders for the entry of judgments of acquittal upon the three several counts of the indictment made at the conclusion of the government's case upon the ground that the evidence was insufficient to sustain a conviction of the defendant should have been granted.

4. The motion of the defendant for orders for the entry of judgments of acquittal upon the three several counts of the indictment made at the close of all of the evidence upon the ground that the evidence was insufficient to sustain a conviction of the defendant should have been granted.

5. The court erred in excluding the evidence contained in offers of proof numbered 1, 2, 3, 4, and 5, made while the witness, Paul W. Smith, was on the stand, and the evidence contained in [229] offer of proof No. 6 made while the witness Emma Lundby was on the stand.

6. The court erred in admitting the government's exhibits No. 5 and 6 over objections.

7. The court erred in excluding from evidence defendant's offered exhibits numbered 4, 10, 12, 17 and 18, and the portions of exhibits 11 and 15 that were excluded.

8. The court erred in the admission of testimony of the witness, Arthur Matson, over objection and in the denial of the motion to strike portions of the testimony of said witness elicited in response to interrogation by the court.

9. The court erred in failing to give the defendant's offered instructions numbered 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 23, 24, 25 and 26, which were considered by the court before the charge to the jury was given, were marked refused and have been filed with the clerk and appear in the transcript.

10. The court erred in overruling the exceptions of counsel for the defendant to the remarks of the court in interrupting one of the counsel for defendant during the course of his argument to the jury.

11. The court erred in overruling the exceptions to the portions of the oral charge to the jury to which specific objections were made, particularly the objections to the court's definitions of the words "knowingly," "falsely" and "feloniously"; the charge that the direct evidence of one witness entitled to full credit was sufficient to prove any fact in the case; the statement of the court in which it was suggested that the opening statement of defendant's counsel and the evidence in the case disclosed that defendant knew the club could not get a license [230] when the applications were filed; the charge to the effect that the defendant having been born in Canada was therefore a citizen of Canada,

and the other objections as appear in the record for the reasons stated at the time and overruled by the court.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant and Appellant.

Service of the foregoing statement of points admitted and receipt of copy thereof acknowledged this 3rd day of February, 1948.

HARLOW PEASE,
EMMETT C. ANGLAND,
Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed Feb. 9, 1948. [231]

Thereafter, on February 9, 1948, the defendant filed a Designation of the portions of the record to be incorporated in the record on appeal herein, in the words and figures following, to wit: [232]

[Title of District Court and Cause.]

DESIGNATION

Comes now the defendant and designates the portions of the record in the United States District Court to be contained in the record on appeal as follows:

The indictment on file herein; the minutes of the court upon the plea of the defendant; the notice

of motion and motion for bill of particulars; notice of motion and motion to dismiss the indictment; the minutes of the court relating to the trial of the defendant; the reporter's transcript of all of the testimony and proceedings had at the trial, including the instructions given and refused; all exhibits introduced at the trial; the verdict of the jury; the judgment of the District Court; the notice of appeal; this designation; defendant and appellant's statement of points; and the order of the court relating to the transmission of original exhibits, one to seven, inclusive, introduced or offered at the trial to the Circuit Court of Appeals.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant and Appellant.

Service of the foregoing designation admitted and receipt of copy thereof acknowledged this 3rd day of February, 1948.

HARLOW PEASE,
EMMETT C. ANGLAND,
Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed Feb. 9, 1948. [233]

Thereafter, on February 18, 1948, a Stipulation was duly filed herein to incorporate in the Transcript herein, certain additional portions of the Reporter's Transcript, being in the words and figures following, to wit: [277]

In the District Court of the United States, District of Montana, Helena Division

No. 6747

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS RAPHAEL DE PRATU,

Defendant.

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto, acting by and through their respective counsel, that the reporter's transcript of proceedings had in the above-entitled cause heretofore filed herein may be amended by incorporating therein the transcript of all of the Voir Dire Examination of the jurors who sat as the trial jury in said cause.

Dated this 17th day of February, 1948.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant and Appellant.
HARLOW PEASE,
EMMETT C. ANGLAND,
Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed February 18, 1948. [278]

Thereafter, on February 18, 1948, an Order to incorporate certain additional portions of the Reporter's Transcript in the record on appeal was filed herein, being in the words and figures following, to wit: [279]

[Title of District Court and Cause.]

ORDER

Pursuant to the stipulation of counsel filed herein and it appearing a proper case therefore:

It Is Hereby Ordered that the transcript of proceedings, had at the trial of the above-entitled cause filed herein by the official court reporter may be supplemented by incorporation therein of the transcript of all of the Voir Dire Examination of the jurors who sat as the trial jury in the above-entitled cause which has likewise been prepared and certified to by John J. Parker, official court reporter.

Dated this 17th day of February, 1948.

R. LEWIS BROWN,
United States District Judge.

[Endorsed]: Filed February 18, 1948. [280]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing three volumes consisting of 280 pages, numbered consecutively from 1 to 280, inclusive, constitute a full, true and correct transcript of all portions of the record in Case No. 6747, United States of America vs. Louis Raphael De Pratu, required to be incorporated therein by designation of appellant, as the record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that, pursuant to the order of said District Court, I transmit herewith, as a part of the record on appeal, the following original exhibits introduced or offered at the trial of said cause, to wit: exhibits Nos. 1, 2, 3, 4, 5, 6, and 7.

I further certify that the costs of said transcript amount to the sum of Thirty-two and 90/100 Dollars ($32.90) and have been paid by the appellant.

Witness my hand and the seal of said Court at Helena, Montana, this 18th day of February, A.D. 1948.

[Seal] /s/ H. H. WALKER,
Clerk, U. S. District Court,
District of Montana. [281]

[Endorsed]: No. 11842. United States Circuit Court of Appeals for the Ninth Circuit. Louis Raphael De Pratu, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed February 21, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11842

UNITED STATES OF AMERICA,
Plaintiff and Respondent,

vs.

LOUIS RAPHAEL DE PRATU,
Defendant and Appellant.

ADOPTION OF STATEMENT OF POINTS

Comes now the defendant and appellant and adopts the statement of points upon which he intends to rely on the appeal which was heretofore filed in the district court of the United States in

and for the District of Montana and appears as a part of the transcript of record.

/s/ CHARLES DAVIDSON,
/s/ ARTHUR P. ACHER,
Attorneys for Defendant and Appellant.

Service of the foregoing adoption of statement of points admitted and receipt of copy acknowledged this 19th day of February, 1948.

/s/ HARLOW PEASE,
/s/ EMMETT C. ANGLAND,
Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed Feb. 24, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF THE PORTIONS OF THE RECORD TO BE PRINTED

Comes now the defendant and appellant and designates the following portions of the record which he desires to have printed, to wit: The entire record including the exhibits that were introduced or offered at the trial of the above entitled cause save and except certain exhibits and portions of exhibits and certain statements of counsel and of the Court in connection therewith, as follows:

1. That, if possible, photostatic copies of plaintiff's exhibits 1 and 2, defendant's exhibits 3 and 4, and plaintiff's exhibit 5 be incorporated in the printed record rather than printed copies thereof.

2. That only portions of plaintiff's offered Exhibit 7 be printed, as follows: namely the certificate appearing at the front of the instrument; that portion of page 1 consisting of the title of the proceedings and including the manifest data read to applicant, in other words, down to and including the words "but that otherwise, the orchestra would be willing to play for expenses," and all that portion of page 10 of said exhibit from the top of the page down to and including the 9th answer given and shown upon said page 10.
3. That the matter appearing from and including line 20, page 3, to and including line 6, page 10, be omitted.
4. That the matter commencing with the words "I don't intend" page 10, line 9, to and including line 10, page 14, be omitted.
5. That following the statement appearing at line 15, page 14 "(Thereupon, after a jury was drawn and sworn, the following proceedings were had:)," the voir dire examination of the 12 jurors who sat as a trial jury in said action be printed.
6. That the opening statement of counsel for the plaintiff commencing at line 19, page 14, to and including line 13, page 18, be omitted and that a statement be inserted in lieu thereof "Thereupon Mr. Pease made the opening statement for the Government:"

7. That the matter appearing from and including line 15, page 47, to and including line 1, page 51, be omitted.

/s/ CHARLES DAVIDSON,
/s/ ARTHUR P. ACHER,
Attorneys for Defendant and Appellant.

Service of the foregoing designation admitted and receipt of copy thereof acknowledged this 19th day of February, 1948.

/s/ HARLOW PEASE,
/s/ EMMETT C. ANGLAND,
Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed Feb. 24, 1948.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

Now comes the Appellee, pursuant to and within the time allowed by rule 75 of procedure, and designates the following portions of the record to be printed, which have not been designated by the appellant, to wit:

1. That there be included in the record all of the matter beginning with line 7 on page 10 to and including line 17 on page 12 of the transcript.

2. Appellee objects to the inclusion in the record of any part of the appellee's proposed Exhibit 7 except those parts offered in evidence as appears in the matter from line 24 of page 62 to and including line 8 of page 63 (to which offer the Court sustained an objection on behalf of the appellant.) (Record page 72, lines 2 and 3.) And specifically objects to the inclusion in the record of that portion of said proposed Exhibit 7 immediately following the words, "determine admissibility," and commencing with the words, "Chairman to Applicant," down to and including the words, "would be willing to pay for expenses;" on the ground that said portion last mentioned was never offered in evidence, either by the government or the defendant, and forms no basis for the ruling of the Court; further that the only ruling of the Court upon said Exhibit was a ruling in favor of the appellant.

/s/ JOHN B. TANSIL,
United States Attorney for the District of Montana.

/s/ HARLOW PEASE,
Ass't. United States Attorney for the District of Montana.

/s/ EMMETT C. ANGLAND,
Ass't. United States Attorney for the District of Montana.

[Endorsed]: Filed March 1, 1948.

No. 11842

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

LOUIS RAPHAEL DE PRATU,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Upon Appeal From The District Court of the United States for the District of Montana

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Filed.....

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Clerk.

No. 11842

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

LOUIS RAPHAEL DE PRATU,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Upon Appeal From The District Court of the United States for the District of Montana

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CASES CITED

UNITED STATES STATUTES CITED

MONTANA STATUTES CITED

TEXT BOOKS CITED

JURISDICTIONAL STATEMENT

In this case the defendant was charged by indictment filed in the District Court of the United States, District of Montana, Helena Division, with a violation of the provisions of Section 746 (a) (18), Title 8 United States Code, by knowingly, falsely and feloniously having represented himself to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen.

The District Court had jurisdiction by virtue of the provisions of Section 41, Title 28 United States Code, under which the District Courts have original jurisdiction of all crimes and offenses cognizable under the authority of the United States.

A judgment of conviction having been rendered in the District Court, an appeal was taken to this Court under the New Federal Rules of Criminal Procedure, which follow Section 687, Title 18, United States Code, effective March 21, 1946.

This Court has jurisdiction of the appeal by virtue of the provisions of Section 225, Title 28, United States Code.

STATEMENT OF THE CASE

The defendant, Louis Raphael De Pratu, was charged by an indictment containing three counts with falsely representing himself to be a citizen in violation of Section 746 (a) (18) Title 8 United States Code.

The first count charges that on or about June 27, 1946, the said defendant, in an application for a retail liquor license under the laws of the State of Montana, filed by him with the Montana Liquor Control Board at Helena, Montana, knowingly, falsely and feloniously represented himself to be a citizen of the United States, whereas in

truth and in fact the defendant was not a citizen (tr 2).

Count two of the indictment charges a like offense alleged to have been committed on January 15, 1946, in an application filed with the Montana Liquor Control Board (tr 3).

Count three charges that on September 11, 1946, the defendant falsely claimed citizenship through the naturalization of his father under oath before a board of special inquiry of the Immigration and Naturalization Service of the United States at Sweetgrass, Montana (tr 2-4).

The defendant moved to dismiss each count of the indictment upon the ground that an offense against the laws of the United States was not charged (tr 8), but the motion was denied (tr 10).

The defendant moved for a bill of particulars (tr 5) which was denied (tr 10).

The cause was tried before a jury and at the conclusion of the government's case a motion was made for a judgment of acquittal upon each count of the indictment (tr 134). The motion separately addressed to each count of the indictment was denied by the Court (tr 140).

The defendant offered testimony in his own behalf and at the conclusion of the evidence renewed his motion for a judgment of acquittal (tr 179). The motion was by the Court denied (tr 181) and the case was submitted to the jury.

The jury returned a verdict of guilty (tr 17) whereupon the defendant was sentenced to serve terms of 16 months on each of the three counts of indictment to run concurrently and to pay fines of $500.00 under each count of the indictment (tr 18) from which judgment of conviction this appeal is prosecuted (tr 20).

The defendant and appellant contends that the several counts of the indictment failed to charge offenses against the laws of the United States, and that the motion to dismiss should have been granted; that the Court erred in failing to grant the defendant's motion for judgment of acquittal made at the close of the government's case and renewed at the close of all the evidence; that the Court erred in excluding certain offers of proof, and in excluding from evidence certain exhibits offered by defendant, in admitting certain exhibits for the government over objection, in admitting certain testimony over objection and in denying motions to strike that evidence, in failing to give certain instructions offered by the defendant, in overruling exceptions of counsel to remarks of the Court, and in overruling exceptions to the oral charge of the jury to which specific objections were made (tr 247).

These grounds of error hereinafter separately set forth it is contended require the reversal of the judgment of conviction in this case.

SPECIFICATIONS OF ERROR

1. The Court erred in denying the motion for the dismissal of the first count of the indictment upon the ground that it fails to charge an offense against the laws of the United States (tr 29).

2. The Court erred in denying the motion for the dismissal of the second count of the indictment upon the ground that it fails to charge an offense against the laws of the United States (tr 29).

3. The Court erred in denying the motion for the dismissal of the third count of the indictment upon the ground that it fails to charge an offense against the laws of the United States (tr 29).

4. The Court erred in denying the motion of the defendant for an order for the entry of a Judgment of Acquittal upon the first count of the indictment made at the conclusion of the Government's case upon the ground that the evidence was insufficient to sustain a conviction (tr 140).

5. The Court erred in denying the motion of the defendant for an order for the entry of a Judgment of Acquittal upon the second count of the indictment made at the conclusion of the Government's case upon the ground that the evidence was insufficient to sustain a conviction (tr 140).

6. The Court erred in denying the motion of the defendant for an order for the entry of a Judgment of Acquittal upon the third count of the indictment made at the conclusion of the Government's case upon the ground that the evidence was insufficient to sustain a conviction (tr 140).

7. The Court erred in denying the motion of the defendant for an order for the entry of a Judgment of Acquittal upon the first count of the indictment made at the close of all the evidence upon the ground that the evidence was insufficient to sustain a conviction (tr 181).

8. The Court erred in denying the motion of the defendant for an order for the entry of a Judgment of Acquittal upon the second count of the indictment at the close of all the evidence upon the ground that the evidence was insufficient to sustain a conviction (tr 181).

9. The Court erred in denying the motion of the defendant for an order for the entry of a Judgment of Acquittal upon the third count of the indictment made at the close

of all the evidence upon the ground that the evidence was insufficient to sustain a conviction (tr 181).

10. The Court erred in excluding the evidence contained in offers of proof 1, 2, 3 and 5, all made while the witness Paul W. Smith was on the stand, relating to the circumstances under which the applications for liquor licenses were considered by the Montana Liquor Control Board, these offers of proof being set forth in the appendix to this brief, pages 55-57.

11. The Court erred in admitting Government's exhibit number five, an alien registration form, a photostatic copy of which appears at page 96-98 of the transcript to which objection was made as follows:

> "the same is incompetent as evidence to prove that the defendant is not a citizen and upon the further ground it would not be admissable as an admission until the corpus delicti has first been shown by competent evidence,
>
> The Court: Objection will be overruled, the exhibit will be admitted."

12. The Court erred in excluding from evidence certain minutes of the Stockmen's Club, a corporation, contained in proposed exhibits 10, 12, 17, 18, set forth in full in the appendix hereto, pages.....

13. The Court erred in refusing to give defendant's offered instruction number ten (tr 204).

14. The Court erred in refusing to give the defendant's offered instruction number eleven (tr 205).

15. The Court erred in refusing to give the defendant's offered instruction number twelve (tr 205).

16. The Court erred in refusing to give the defendant's offered instruction number thirteen (tr 205).

17. The Court erred in refusing to give the defendant's offered instruction number fourteen (tr 206).

18. The Court erred in refusing to give the defendant's offered instruction number sixteen (tr 207).

19. The Court erred in refusing to give the defendant's offered instruction number twenty-one (tr 208).

20. The Court erred in refusing to give the defendant's offered instruction number twenty-three (tr 209).

21. The Court erred in refusing to give the defendant's offered instruction number twenty-four (tr 210).

22. The Court erred in refusing to give the defendant's offered instruction number twenty-five (tr 210).

23. The Court erred in refusing to give the defendant's offered instruction number twenty-six (tr 210).

24. The Court erred in its oral charge to the jury defining the word "knowingly" (tr 222) to which objection was made before the jury retired (tr 242).

25. The Court erred in its oral charge to the jury in defining the word "falsely" (tr 223) to which objection was made before the jury retired (tr 243).

26. The Court erred in its oral charge that the direct evidence of one witness entitled the full credit was sufficient for proof of any fact embodied in the case (tr 225) to which objection was made before the jury retired (tr 244).

27. The Court erred in its oral charge to the jury in stating that the defendant having been born in Canada was an alien (tr 239) to which objection was made before the jury retired (tr 245).

28. The Court erred in its oral charge to the jury in stating that the defendant knew that in order to do business he applied for a liquor license himself and was to

hold it for two years until the club became qualified (tr 238) to which objection was made before the jury retired (tr 244-5).

29. The Court erred in overruling the exceptions made to the remarks of the Court during the course of the argument of the case to the jury (tr 211-2).

All of the foregoing specifications of error were incorporated in the statement of points filed in the District Court (tr 247) and adopted in this Court (tr 255).

ARGUMENT

THE INDICTMENT FAILS TO CHARGE A PUBLIC OFFENSE

Specification of Error No. 1

The Court erred in denying the motion for the dismissal of the first count of the indictment upon the ground that it fails to charge an offense against the laws of the United States (tr 29).

Specification of Error No. 2

The Court erred in denying the motion for the dismissal of the second count of the indictment upon the ground that it fails to charge an offense against the laws of the United States (tr 29).

Specification of Error No. 3

The Court erred in denying the motion for the dismissal of the third count of the indictment upon the ground that it fails to charge an offense against the laws of the United States (tr 29).

The sufficiency of the Indictment was raised in the lower court by motion to dismiss (tr 8) which was by the court denied (tr 29).

The first count of the indictment reads as follows:

"On or about June 27, 1946, at Helena, in the District of Montana, and within the jurisdiction of this Court, the above named defendant, Louis Raphael De Pratu, did knowingly, falsely and feloniously represent himself

to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen of the United States, in that the said defendant, in an application for a retail liquor license under the laws of the State of Montana filed by him with the Montana Liquor Control Board, did state as follows:

"Are you a citizen of the United States? A. Yes," whereas in truth and in fact the said defendant was not then and never has been a citizen of the United States, which he, the said defendant, well knew." (tr 2)

The second count is identical with the first save for the date of the offense which is alleged to be January 15, 1946 (tr 3).

The third count of the indictment is as follows:

"On or about September 11, 1946, at Sweetgrass, in the District of Montana, and within the jurisdiction of this Court, the above named defendant, Louis Raphael De Pratu, did knowingly, falsely and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen of the United States, in that the said defendant, before a board of special inquiry of the Immigration and Naturalization Service of the United States, having been first duly sworn as a witness did wilfully and knowingly testify in part as follows:

"Q. Of what country are you now a citizen? A. United States . . . I acquired United States citizenship through my father who naturalized in the United States while I was a minor," whereas in truth and in fact, the defendant was not then and never had been a citizen of the United States, as he, the said defendant then well knew." (tr 3)

It is our contention that the indictment is fatally defective for the reason that in each count the fraudulent purpose for which the defendant is alleged to have made a false representation of citizenship is not set forth and it

is not alleged, nor is it shown, that the one to whom the representations were made had a right to inquire into or an adequate reason for ascertaining the defendant's citizenship.

Section 746 (a) (18) Title 8, U. S. Code, under which the indictment was drawn provides:

"(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—"

"(18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States."

In United States v. Achtner (CCA2) 144 F. (2d) 49, the court discusses the history of this statute, stating: (p. 50)

"The statute, 8 U. S. C. A., Sec. 746 (a) sets out in thirty-four numbered subdivisions at least that number of separate offenses related in some way to naturalization proceedings, citizenship status, and the control of aliens in this country. It represents for the most part a codification in one place in the Nationality Act of 1940 of offenses formerly scattered in various places. Subdivision (18), with which we are immediately concerned, makes it a felony for any alien 'knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.' This subdivision is a substantial re-enactment of the repealed 18 U. S. C. A. Sec. 141, originally passed in 1870, which, under the heading, 'Falsely claiming citizenship,' made liable to fine and imprisonment of person who 'for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship.' Thus, the only pertinent difference between the definitions of the two sections is that the present statute has

substituted the words 'knowingly to falsely represent' in the place of the prior representation 'for any fraudulent purpose whatever.' "

The Court stated: (p. 52)

"But we agree with the District Court that the representation of citizenship must still be made to a person having some right to inquire or adequate reason for ascertaining a defendant's citizenship; it is not to be assumed that so severe a penalty is intended for words spoken as a mere boast or jest or to stop the prying of some busybody, and the use of the words 'knowingly' and 'falsely' implies otherwise. Thus, it is said that the word 'falsely,' particularly in a criminal statute, suggests something more than a mere untruth and includes 'perfidiously' or 'treacherously,' Dombroski v. Metropolitan Life Ins. Co., 126 NJL 545, 19 A. 2d. 678, 680, 20 A. 2d. 441; 35 C. J. S., Falsely, pp. 626, 627, or 'with intent to defraud,' as has been held with respect to the counterfeiting laws, United States v. Otey, C. C. Ore., 31 F. 68; United States v. King. C. C. Ohio, Fed. Cas. No. 15,535; United States v. Moore, D. C. N. D. N. Y., 60 F. 738; United States v. Glasener, D. C. S. D. Cal, 81 F. 566; Kaye v. United States, 7 Cir., 177 F. 147, 151; Dreyer v. McCormack Real Estate Co., 164 App. Div. 41, 149 N. Y. S. 322, a construction particularly applicable here where the required lack of truth of the representation is set forth in other express language of the statute."

It is the appellants contention that the representation of citizenship must be made for a fraudulent purpose; that as the court said in the Achtner case, supra, "words spoken as a mere boast or jest or to stop the prying of some busybody" would not constitute a crime.

In other words the representation to be fraudulent must be of a *material* fact. Thus, in United States v. Raymond (D. C. Wash.) 37 F. Supp., 957, 958, Judge Schwellenbach stated:

"The rule is universally recognized that for a representation to be fraudulent it must be made concerning

a material fact with knowledge of its falsity and with intent to deceive. . . . "

The decisions under Section 746 (18) Title 8 hold that while the statute if literally read would subject the accused to punishment for making a false representation as to citizenship regardless of the circumstances, it must be construed to include fraud as an essential element.

United States v. Romberg (CCA 2)
150 F. (2d) 116

United States v. Tandaric (CCA 7)
152 F. (2d) 3

Therefore, we contend that since a fraudulent purpose is an essential element of the crime, it must be alleged in the indictment.

Since the trial of this case, United States v. Weber (D. C. Ill.) 71 Fed. Supp., 88, has been reported, squarely supporting our contention. The Court said: (pp. 90-91)

"The question before me in the present case is whether an indictment which fails to charge an element of a statutory crime is sufficient, when such element is not actually contained in the statute but rather is interpreted into it, as was done by the Circuit Court of Appeals for the Seventh and Second Circuits of the Tandaric and Achtner cases. . . .

All ingredients which enter into the offense, whether set down in the statute in terms *or interpreted into it, must be stated.*" . . .

In United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135, the Supreme Court said:

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless these words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense intended to be punished; . . .

. . . The indictment in the present case charges that defendant, who was not a citizen of the United States, falsely represented himself to the Andrews Company, and to its officials, as being a citizen. These facts might all be admitted to be true, and yet the defendant have been innocent of the crime with which he is charged. He might have made the representation to a person who had no right to inquire into, or an adequate reason for ascertaining, the defendant's citizenship, or, as the court said in the Achtner case, to stop the prying of some busybody. Under none of these conditions would the defendant have been guilty of the crime with which he is charged. There is no distinct or specific allegation in the indictment advising defendant of the fraudulent purpose for which he is accused of having made the false representation as to his citizenship. Defendant is entitled to have all of these facts sufficiently set forth in order that he may prepare his defense; and they must be sufficiently definite to be pleaded in bar of a subsequent prosecution. I do not believe that the indictment meets these requirements."

THE MOTION FOR THE ENTRY OF A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED

Specifications of Error No. 4 to 9, inclusive.

The Court erred in denying the motion of the defendant for an order for the entry of a Judgment of Acquittal made at the conclusion of the Government's case and renewed at the close of all the evidence upon the ground that the evidence was insufficient to sustain a conviction (tr 140). (tr 181).

The defendant appropriately moved for a judgment of acquittal as to each count of the indictment at the close of the Government's case (tr 140) and at the close of all the evidence (tr 181), but the motions were denied.

While evidence was offered on the part of the defendant the only facts developed with respect to the citizenship status of the defendant were those presented in the Government's case.

The defendant contends that the Government failed to show that the defendant had not been naturalized or otherwise admitted to citizenship beyond a reasonable doubt, and that accordingly there was a failure of proof of an essential element of the crime charged in each count of the indictment. Accordingly each of the Specifications of Error Nos. 4 to 9 inclusive raise the same legal question.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A JUDGMENT OF CONVICTION

To sustain the allegations of the indictment, the Government offered in evidence two applications for retail liquor licenses filed with the Montana Liquor Control Board, signed by the defendant De Pratu. Plaintiff's exhibit one is dated June 27, 1946 (tr 75). Plaintiff's exhibit two is dated January 15, 1946 (tr 77). Photostatic copies appeared in the transcript. The applications each contain the following representation relied upon by the Government:

"(4) Are you a citizen of the United States: YES (tr 75)."

Count one of the indictment is based on Exhibit one. Count two of the indictment is based on Exhibit two. The third count is based on the following facts.

Arthur Matson, an Immigrant Inspector (tr 106), testified that on September 11, 1946 (tr 125), he conducted a hearing at Sweet Grass, Montana, at which the defendant testified. Pursuant to interrogation by the court he said:

"The Court: I don't care what you usually say, what did you say to that man?

A. Of what country are you now a citizen.

The Court: What did he say?

A. He said of the United States." (tr 129)

On cross examination he testified:

"Q. Did you ask him how he acquired United States citizenship. A. Yes.

Q. What answer did he give you?

A. He said someone had told him he had acquired it because he came to the United States when a young fellow, that's about the way.

Q. So, are you now satisfied that in answer to the question 'How did you acquire United States citizenship' that the defendant answered, 'I didn't, they told me I was under age and that I was a citizen?'

A. Well, that's correct." (tr 131-132)

As evidence that the defendant was not a citizen, an alien registration form was introduced in evidence which had been signed by the defendant in 1940 (tr 97) which states that the defendant was born on October 21, 1878, at Alexandera, Ontario, Canada; that he entered the United States on August 15, 1896, by train at Sault St. Marie, Michigan; had lived in the United States 43 years and expected to remain permanently. The form also states:

"I am a citizen or subject of UNCERTAIN, BUT LAST OF CANADA."

A certificate of non-existence of naturalization record was offered in record which recites:

". . . There does not appear therein any record filed pursuant to the foregoing statutes nor any record whatsoever evidencing the naturalization of one Louis Raphael De Pratu or Louis Patrick De Pratu." (tr 100)

A stipulation was also offered in evidence that the defendant had on February 8, 1936, filed an application for registry as an alien which states:

"I, Louis Raphael De Pratu, Gillman, Montana, an alien, believing that there is no record showing that I am now a lawful permanent resident of the United States, hereby request that under the provisions of the Act of Congress approved March 2, 1929, a record of

registry of my arrival in the United States be made." (tr 102)

It was also stipulated, however, in connection with this application for registry as follows:

"That on April 15, 1937, the defendant was advised by the United States Department of Labor Immigration and Naturalization service that the central office in Washington had cancelled the application for registry filed by Louis Raphael De Pratu on February 10, 1936, and returned him the registry fee submitted with his application. The central office further advised that this action was taken for the reason that registry in the case was unnecessary since it appeared that De Pratu entered the United States prior to June 30, 1906." (tr 102)

An official of the Immigration and Naturalization Service whose territorial jurisdiction included Montana, Idaho, a part of Washington and Oregon (tr 100), testified that the records in his office did not disclose a record of the defendant's naturalization (tr 104). On cross examination he testified:

"Q. You state you have no record of application for naturalization made by Mr. De Pratu. Isn't it true that if a child is automatically made a citizen of the United States by reason of the naturalization of his parent, you would have no record of it?

A. Not necessarily.

Q. You would have if they applied for a derivative certificate? A. That's right.

Q. But otherwise you would not have?

A. That's right. (86)

Q. Mr. Nooney, do you know whether or not that is true of every immigration and naturalization office with respect to the records of children?

A. Yes, sir, that is correct." (tr 104-105)

It is our contention that this evidence is wholly insufficient to establish that fact that the defendant was an alien.

ALIENAGE WAS NOT SHOWN BEYOND A REASONABLE DOUBT

An analysis of the evidence fails to show that defendant was not a citizen of the United States, as charged.

Counts one and two of the indictment charge the defendant with falsely representing himself to be a citizen in general terms—no particulars are given. Count three, however, sets forth in what way defendant claimed citizenship, and alleges that such a claim was false. The language of the third count with respect to the claim of citizenship is as follows:

> "The above named defendant . . . . did wilfully and knowingly testify in part as follows: 'Q. Of what country are you now a citizen? A. United States . . . I acquired United States citizenship through my father who was naturalized in the United States while I was a minor,' whereas in truth and in fact, the defendant was not then and never had been a citizen of the United States, as he the said defendant then well knew." (tr 3-4)

This raises the question as to whether defendant's father was a citizen of the United States. Count three states that that was defendant's claim to citizenship. Count three therefor is the important count in the indictment. If the proof is insufficient on that count, then it is insufficient as to the other two counts.

It should first be noted that no where in the record is there any evidence of the citizenship, or lack of citizenship of defendant's father. The father's name was not mentioned at any time. Count three charges that defendant made a claim to citizenship through his father and the witness Matson testified that defendant made such a statement. (tr 115, 131) But there is nothing in the record to

show such a statement was untrue. The record is entirely silent.

There being no proof as to the non-citizenship of defendant's father, does the other proof submitted sustain the charge?

Exhibit 6 is a certificate of non-existence of naturalization record of Louis Raphael De Pratu. (tr 99-100) The testimony of the witness Nooney (tr 103-104) is that the Spokane office of the Immigration and Naturalization Service did not show a record of the naturalization of defendant. This evidence establishes one thing only—that there is no record of defendant's naturalization. It could be held from this evidence that defendant was not naturalized, through his own naturalization. But this evidence proves nothing further. However, that is not the false claim of citizenship charged against defendant. According to the testimony of the witness Matson, defendant claimed citizenship, not through his own naturalization, but by reason of the naturalization of his father.

If defendant became a citizen through the naturalization of his father there would be no record of defendant's citizenship in the Immigration and Naturalization Service. (See cross examination of witness Nooney set forth above.)

Exhibit 6 is therefore no proof whatever as to the falsity of the charge against defendant.

Exhibit 5 is the Alien Registration form of Louis Raphael De Pratu. (tr 96-98) It establishes that defendant was born in Canada on October 21, 1878; that he came to the United States on August 15, 1896, had lived in the United States for forty-three years, and expected to remain permanently. This form was executed in 1940. As to citizen-

ship, it shows that defendant states, in answer to the question as to the country of his citizenship, "Uncertain, but last of Canada."

Is this exhibit evidence of non-citizenship of defendant? It merely shows that defendant was born in Canada, that he came to this country when seventeen years of age and has resided continuously in United States since that time, and that he was uncertain of his citizenship. The exhibit certainly does not prove he is not a citizen.

The Alien Registration Law required all aliens to register, and provided a penalty for failure to register. 54 Stat. 675, U. S. C. Title 8, Sec. 457. No penalty was provided if a citizen did register, or if a person registered who was uncertain as to his citizenship. If defendant was uncertain of his citizenship at that time, he did the prudent thing—he registered.

There evidently was a doubt in the mind of defendant in 1940 as to his citizenship as disclosed by exhibit 5. But that doubt might have been removed before 1946, the date of the acts alleged in the indictment. It is not unusual for people to be doubtful as to their citizenship. And particularly is this true of children, born of aliens or born of citizens, or whose parents were naturalized after the child's birth.

Does exhibit 5 prove that defendant was not a citizen? Does it prove that defendant's father was not a citizen? We cannot see how it proves either one of these points. It can be, and is contended by defendant, that exhibit 5 shows that he could be a citizen. This is discussed later in this brief.

This leaves only the application for certificate of registry. (tr 102) The record shows that it was stipulated that on February 8, 1936, defendant filed an application for certificate of registry under the Act of March 2, 1929, and that on April 15, 1937, the application was cancelled since it appeared that defendant entered the United States prior to June 30, 1906.

The Act of June 29, 1906, 54 Stat. 1152, U. S. C. Title 8, Sec. 729, provides that a certificate of arrival shall be issued to each person, not a citizen, who enters the United States after the date of the Act. It further provides that no certificate of arrival is necessary for a person entering prior to June 29, 1906.

The Act of March 2, 1929, 45 Stat. 1512, 1513 (now found as amended in U. S. C. Title 8, Sec. 728) provides that if no record of arrival of an alien (who arrived after June 29, 1906) can be found, an application for registry might be made, and a certificate of registry issued, upon compliance with that law.

Defendant was, therefore, in the year 1936, attempting to have a record made of his arrival into this country. But since it was found that he had entered prior to June 30, 1906, the application was cancelled.

Does this show that defendant or his father were not citizens? Four years later, in his Alien Registration Form (Exhibit 5), defendant stated that he was uncertain as to his citizenship. Perhaps this uncertainty existed in 1936, and defendant was attempting to clear it up. Then too, defendant might have been attempting to secure a record of his entry in order to apply for a certificate of derivative citizenship. The form used in applying for a certificate of registry is the same whether the applicant is an alien, or a

derivative citizen desiring a derivative certificate. It is difficult to see how this can be considered proof that defendant was not a citizen in 1946.

We have considered all of the evidence and proof submitted by plaintiff to show that defendant was not a citizen in 1946. We respectfully submit that there is nothing in the record to show that defendant was an alien in 1946. And particularly is there nothing in the record to show that he was not a citizen by reason of his father's naturalization—and that is the charge against him.

DERIVATIVE CITIZENSHIP IS POSSIBLE

It is the contention of defendant that the proof submitted against him, not only does not prove he is alien, but is consistent with his statement set out in count three that he is a citizen by reason of his father's naturalization—derivative citizenship.

It is unnecessary to again set out the evidence produced against defendant, and which has heretofore been analyzed. As is hereinafter pointed out, the Court laid more stress on Exhibit 5, to show alienage, than any other part of the evidence.

Exhibit 5 is the Alien Registration Form (tr 96-98). It shows that defendant came to the United States from Canada on August 15, 1896, and when he was seventeen years of age. (He was born in Canada, October 21, 1878.) It further shows that he has resided continuously in the United States since that time.

In view of these uncontradicted facts, could defendant have acquired citizenship through the naturalization of his father? It is plain that he could. The law in effect at the time of defendant's entry and at the time he reached the age of twenty-one years was as follows:

"The children of persons who have been naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons, who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof." Act of April 14, 1802, Revised Statutes Sec. 2172.

"All children out of the limits and jurisdiction of the United States, whose fathers may be at the time of their birth citizens of the United States, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States. . . . " Act of April 14, 1802, Rev. Statutes Sec. 1993.

In construing Section 2172, the Supreme Court held that it operated prospectively. See Boyd v. Nebraska ex. rel. Thayer, 143 U. S. 135, 12 Sup. Ct. Rep. 375, 36 L. Ed. 103.

From these statutes, the defendant could have acquired citizenship from his father, in one of two ways, namely:

1. If defendant's father had been naturalized as a citizen of the United States prior to the birth of defendant, defendant would have been a citizen of the United States at birth, even though born in Canada. In other words, naturalization of defendant's father would have conferred citizenship upon defendant.
2. If defendant's father had been naturalized in the United States during the minority of defendant, defendant would have become a citizen of the United States—a derivative citizen. Particularly would this be true since the evidence establishes that defendant entered the United States while only seventeen years

of age, and has resided continuously in the United States since that time. (Exhibit 5—tr 96-98)

Section 2172 has been amended by the Nationality Act of 1940. 54 Stat. 1145, U. S. C. Title 8, Sec. 714. It now provides that derivative citizenship is acquired only if the child has been lawfully admitted to the United States for permanent entry. But this has no application, as it was not in effect at the time defendant entered the United States nor when he arrived at his majority.

54 Stat. 1150, U. S. C. Title 8, Sec. 739, provides for the issuance of a certificate of derivative citizenship to those who have derived citizenship through the naturalization of a parent. This section does not confer citizenship, but makes provision for tangible evidence of citizenship.

In re Tate, DC Pa. 1 F. 2d. 457

The application of defendant for a certificate of registry was used as evidence against him (tr 102). In view of the amendment to Section 2172, noted above, could it not be properly concluded that defendant was taking the first step to secure a certificate of derivative citizenship, by having a record made of his legal entry? We submit that it could.

Since there is no evidence in the record to show the non-citizenship of defendant's father, we submit that the evidence produced at the trial not only failed to prove that defendant was not a derivative citizen, but is consistent with the fact that he is a derivative citizen.

THE PRESUMPTION OF INNOCENCE CONTROLS

The only evidence submitted to show defendant's lack of citizenship is found in Exhibit 5—Alien Registration Form (tr 96-98). The Court, in overruling defendant's motion for verdict of acquittal at the close of plaintiff's

case, and at the close of all the evidence, stated that this exhibit established defendant to be a citizen of Canada and an alien to the United States, and relied upon the presumption that a thing once shown to exist is presumed to continue so long as things of that nature exist (tr 138). In instructing the jury the Court made practically the same statement (tr 239). In other words the Court held that the defendant having been born in Canada was a Canadian citizen, and that it is presumed that that situation continues to exist. While we will discuss these rulings and instructions of the Court later in this brief, it has been deemed proper to discuss the presumption of innocence under this portion of the brief.

It is elementary that defendant cannot be presumed guilty of a crime, nor can he be found guilty by guesswork. He is presumed innocent and every essential element of the offense must be proven. The non-citizenship of defendant is an essential element of the offense with which he is charged and must be proven beyond a reasonable doubt.

Duncan v. United States (CCA 9)
68 F. 2d. 136

Gulotta v. United States (CCA 8)
113 F. 2d. 683

Colt v. United States (CCA 5)
158 F. 2d. 641

Section 10602, R. C. M. 1935, provides:

"A presumtion is a deduction which the law expressly directs to be made from particular facts."

Section 10606, R. C. M. 1935, provides:

"All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

32. That a thing once proved to exist continues as long as is usual with things of that nature."

The presumption which may be evidence in a court action will not overcome the presumption of innocence. Thus, in People v. Scott (Cal.) 133 Pac. 496, 499:

"if it were a civil action, that the presumption of delivery would follow from the fact of possession of the instrument, this cannot be indulged in opposition of the presumption of innocence, where a material element of a serious criminal charge is involved."

In State v. Wakefield (Ore.) 228 Pac. 115, 121, the court said:

"Section 799, subd. 30, Or. L., is as follows:

'That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.'

This presumption is disputable, and is overcome in a prosecution for adultery by the stronger presumption that the defendant is innocent."

In State v. Sanford (N. M.) 97 Pac. (2d) 915, 921, the court said:

"In Encyclopedia of Evidence, Vol. 9, Presumptions, page 906, it is said: '8. Presumption of Continuance. —A. Generally.—The general statement is sometimes made that a fact, relation, or state of things once shown to exist is presumed to continue until the contrary appears. Such a proposition, however, is not true without regard to the fact involved; it is only those facts or states which are continuous in their nature that are legally presumed to continue.' "

The court then cited from Carver v. United States 160 U. S. 553, 40 L. Ed. 532, in part as follows:

" 'The statements of Miller made at the later interview, if not coming within the category of dying declarations, were hearsay, and should not have been permitted to go to the jury. It was incumbent upon the state to lay the foundation for their admission as dying decla-

rations. Defendants could rely upon the presumption of innocence, and deceased then believed he might recover.' "

The Court then stated:

"The last sentence of the foregoing quotation suggests a consideration of the rule stated by Mr. Lawson in his work on the Law of Presumptive Evidence at page 240, as follows: 'In the case of conflicting presumptions the presumption of the continuance of things is weaker than the presumption of innocence.'

"An examination of the authorities relating to the rule that the existence of a state of facts or condition once proven to exist continues, is ordinarily invoked in civil cases only. In our opinion, in accordance with the view expressed by Professor Lawson, and also by Judge Blanchard in State v. Sadler, the so-called presumption should be sparingly applied in a case where the life or liberty of an accused is at stake."

In 16 C. J. Sec. 1033, page 542, it is stated:

"Some courts state the rule broadly to be that, as between conflicting presumptions, that which is in favor of the innocence of accused prevails. At any rate, where two equal presumptions, one in favor of guilt, are presented, the one in favor of innocence is to be preferred and applied; and where the circumstances and lack of proof are such that the presumption of the continuance of a fact is a weak one, it is overcome by the presumption of innocence."

In Morrison v. California, 291 U. S. 827, 78 L. Ed. 664, 670, it is stated:

" 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' "

See also: Jones on Evidence, 4th Ed. Sec. 101, p. 176.

Dunlop v. United States,
165 U. S. 486, 503, 17 Sup. Ct. Rep. 375, 41 L. Ed. 799, 804

Edwards v. United States (CCA 8),
7 F. 2d. 357, 362

THE CORPUS DELICTI CANNOT BE ESTABLISHED BY THE ADMISSIONS OF THE DEFENDANT

In Duncan v. United States (CCA 9), 68 F. (2d) 136, 142, 143, certiorari denied 54 Sup. Ct. 780, 292 U. S. 646, 78 L. Ed. 1497, the charge was falsely representing citizenship under Section 141 of Title 18. This court said:

> "Appellant argues that all these proofs as to appellant's Rumanian birth and alien citizenship are based on statements and admissions of the defendant, and, therefore, have no higher probative value than the statements and admissions by the appellant, and that such statements and admissions are insufficient to prove the corpus delicti. There can be no doubt of this fundamental rule relied on by appellant."
>
> "With reference to the second count, the charge is that the appellant falsely represented himself to be a citizen of the United States without having been duly admitted to citizenship, etc., in violation of 18 USCA Sec. 141. In order to establish this charge it is not only necessary for the prosecution to show that the appellant was not born in Camden, N. J., but also to show that he was not a citizen of the United States. There is no evidence to establish that fact other than the admissions of the appellant as hereinbefore stated. These were insufficient to prove the corpus delicti."

In Gulotta v. United States (CCA 8), 113 F. (2d) 683, where the charge was under Section 141, Title 18, the court said: (685-686)

> "The appellant's second contention is the more serious. It is that the evidence is not sufficient to support conviction. He relies upon the long-estabished rule that 'extra judicial confessions or admissions are not sufficient to authorize a conviction of crime, unless corroborated by independent evidence of the corpus delicti.'"
>
> "The independent evidence need not be of itself sufficient proof of guilt, but need only be a substantial showing which together with the defendant's confession

or admission establishes the crime beyond a reasonable doubt. Gregg v. United States, 8 Cir., 113 F. 2d. 687, decided at the present term; Pearlman v. United States, 9 Cir., 10 F. 2d. 460, 462. But the rule requires some such independent evidence, and it is conceded by the Government that the record is barren of all such extrinsic evidence in this case, unless a distinction be made between confessions and admissions. And it is argued that such a distinction should be made."

"The rule that to warrant conviction of a crime both confessions and admissions must be corroborated by some independent evidence is illustrated in cases very similar to the present."

"In the absence of such a showing admissions and confessions are received in evidence with the caution and under the necessity of independent proof of the corpus delicti, however alight such proof may be."

In United States v. Isaacson (CCA 2), 59 F. (2d) 966, 967, 968, where the charge was a violation of 8 U. S. C. A. 414 (now 738-746 Title 8) the court said:

"The ancient rule that required the testimony of at least two witnesses to prove the crime of perjury has, indeed, been relaxed. Hashagen v. United States (C. C. A.) 169 F. 396. But what may be called the modern equivalent of this requirement still obtains. This general rule now requires the oath of one witness to be supported by that of another or by some other independent evidence inconsistent with the innocence of the defendant. United States v. Wood, 14 Pet. 430, 10 L. Ed. 527; Allen v. United States (C. C. A.) 194 F. 664, 39 L. R. A. (N. S.) 385; United States v. Otto (C. C. A.) 54 F. (2d) 277. Otherwise there would be but oath against oath and on the theory, I suppose, that each would give the other the lie direct there would be no sound basis for letting a jury reach the conclusion that the oath against a defendant so overbalanced his own that his guilt was proved beyond a reasonable doubt. At least, this puts the requirement on rational ground as was pointed out in Cohen v. United States (C. C. A.) 27 F. (2d) 713. That case dealt with subornation of perjury,

but the principle involved is the same. Hammer v. United States, 271 U. S. 620, 46 S. Ct. 603, 70 L. Ed. 1118."

EXHIBIT 5 SHOULD HAVE BEEN EXCLUDED

Specification of Error No. 11.

The Court erred in admitting Plaintiff's Exhibit 5, over objection.

Exhibit 5 is an Alien Registration form executed by Louis Raphael De Pratu. It recites that he was born in Ontario, Canada, October 21, 1878, that he entered the United States at Sault St. Marie, Michigan, on August 15, 1896, that he expected to remain in the United States permanently, and gives his description. In answer to the question "I am a citizen or subject of," he answered, "Uncertain, but last of Canada." (tr 96-98)

Objection was made to the exhibit when offered, as follows: "Our only objection, your Honor, is upon the ground that the same is incompetent as evidence to prove that the defendant is not a citizen and upon the further ground it would not be admissable as an admission until the corpus delicti has first been shown by competent evidence." (tr 94)

It is unnecessary to set out again the argument that the exhibit fails to disclose that defendant is not a citizen. The date of his birth, the time of his entry into the United States, his length of residence in this country, and his statement as to the uncertainty of his citizenship certainly do not establish, even by inference, that he is not a citizen. Every statement in the exhibit is consistent with the charge against the defendant, namely, that he claimed citizenship through the naturalization of his father while defendant was a minor.

We have heretofore discussed the corpus delicti. It is submitted that the corpus delicti was not proven at any time during the trial. The only proof of lack of citizenship

which was submitted were statements alleged to have been made by defendant.

There is no proof that the party named in the exhibit was the defendant. Except for similarity of name, nothing was produced to show that this exhibit applied to defendant.

THE REFUSAL TO GIVE INSTRUCTIONS ON DERIVATIVE CITIZENSHIP WAS ERROR

Specifications of Error Nos. 22, 23 and 27.

The Court erred in refusing to give defendant's offered instruction No. 25, which reads as follows:

> "You are instructed that all children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." (tr 210)

The Court erred in refusing to give defendant's offered instruction No. 26, which reads as follows:

> "You are instructed that the naturalization and admission to United States citizenship of a father automatically gave United States citizenship to his children under the age of 21 years lawfully admitted to and residing in the United States prior to the age of 21 years. You are further instructed that a person entering the United States prior to June 29, 1906, is presumed to have been legally admitted to the United States for permanent residence." (tr 210)

The Court erred in instructing the jury that defendant, having been born in Canada, was a Canadian citizen and an alien to the United States.

The Court instructed the jury as follows:

> "Having been born in Canada, that fixed his status, ladies and gentlemen, as a Canadian citizen, and, insofar as American citizenship was concerned, an alien, and

there is no presumption that any alien acquires citizenship or any [218] right of citizenship because of continued long residence in the United States, there is no such presumption as that at all. So, if his statement were that he was born in Canada, and the other evidence in this case is true and believed by you, that establishes that he is a Canadian citizen and thus an alien as far as citizenship in the United States is concerned. He says, 'I am a subject or citizen of what country: Uncertain, but last of Canada.' Now, then, you can again consider, so far as the evidence shows, his intent, and whether or not he was sufficiently acquainted with the language to make his thoughts in that regard clear, and you may consider in that regard whether or not, where he says that his citizenship is uncertain, that is any claim that he believes himself to be an American citizen, or any expression of any thought that he believes himself to be an American citizen, and, if there is any uncertainty in the writing, you may consider the fact that the writing was made by him, and if you find that he had sufficient intelligence and knowledge of the language to choose words which would express thoughts and ideas, but, rather than doing that, he chose words that injected uncertainty into the matter, you, of course, may consider the reason, if any, you think he had for doing those things." (tr 239-240)

The offered instructions 25 and 26, both and each, followed the law with respect to United States citizenship. Section 2172, Rev. Stat., which is part of the Act of April 14, 1802, and which was applicable to defendant's status, reads as follows:

"The children of persons who have been naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons, who now are, or have been, citizens

of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof." Revised Statutes Sec. 2172.

Offered instruction No. 26 followed this statute, and is applicable to defendant, and to the evidence submitted. Exhibit 5—the Alien Registration form (tr 96-98)—shows that defendant was living in the United States at the age of seventeen years, and that he entered the United States before June 29, 1906. The application for certificate of registry (tr 102) made by De Pratu was cancelled as he had established that he had entered the United States prior to June 29, 1906 (tr 102). No certificate of arrival is necessary for one entering the United States prior to that date. 54 Stat. 1152, U. S. C. Title 8 Sec. 714.

See:

Boyd v. Nebraska,
12 Sup. Ct. 375, 387, 143 U. S. 135, 36 L. Ed. 103

United States v. Rodgers,
(Pa. 1911) 185 F. 334, 337, 107 C. C. A. 452

North Noonday Min. Co. v. Orient Min. Co.,
(C. C. Cal. 1880) 1 F. 522, 527

Offered instruction No. 25 follows Section 1993 Rev. Stat., which is a part of the Act of April 14, 1802, and which was in effect at the time of defendant's entry into the United States, and at the time of his birth, and at the time of his majority. That statute reads as follows:

"All children out of the limits and jurisdiction of the United States, whose fathers may be at the time of their birth citizens of the United States, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States. . . . " Rev. Stat. 1993.

It is submitted that this offered instruction can be applicable to defendant and to the evidence introduced. Had

defendant's father been naturalized as a citizen of the United States prior to defendant's birth, even though defendant was born in Canada, defendant would have been a citizen by reason of the naturalization of his father. The charge against defendant is that he falsely claimed citizenship through the naturalization of his father. Defendant was entitled to an instruction as to the manner in which this derivative citizenship could be acquired. The Court gave no such instruction.

It is, therefore, submitted that the court erred in refusing defendant's offered instructions Nos. 25 and 26.

INSTRUCTION GIVEN BY THE COURT AS TO CITIZENSHIP

The instruction given by the Court, and above set forth, is clearly not the law. The same was stated by the Court as the law in his reasons for overruling defendant's motion for a verdict of acquittal at the close of plaintiff's case (tr 138-139). The argument on behalf of defendant at that time and the ruling of the Court, are a good summary of the position of the defendant and of the law as construed by the Court (tr 134-140).

The instruction given by the Court, and to which exception was taken before the jury retired (tr 245) in effect advised the jury that the defendant, having been born in Canada was a citizen of Canada, and an alien to the United States, and that that presumption continued until the contrary was shown. In other words, the burden was upon the defendant to establish his citizenship, in view of the fact that the record showed he was born in Canada.

The Court entirely ignored the provisions of Sections 2172 and 1993, above quoted. In passing upon defendant's exception to the charge the Court stated:

"Your theory, as I view it, all the way through is he came over here when he was under the age of 21—it is a matter of no importance, I am not going to change the charge. Call in the jury." (tr 246)

It is hard to understand the attitude of the Court in this regard. Although the defendant is charged with falsely claiming citizenship through the naturalization of his father; although the law states that a minor child residing in the United States during his minority, gains citizenship through the naturalization of his father during such child's minority; although the record establishes that defendant was in the United States during his minority, and although the record is entirely silent as to defendant's father, the Court stated that it was a matter of no importance that defendant came to the United States while under the age of 21.

The Court relied entirely upon the fact that the evidence showed the defendant to have been born in Canada. To the Court, that was controlling. But it is respectfully submitted, that the statement made by the defendant as to the manner in which he acquired citizenship, necessarily assumes that he was born abroad. If defendant had been born in the United States, he would not need his father's naturalization to become a citizen. He would be a native born citizen in his own right. U. S. Const., Amd. 14. He must have been born abroad to claim citizenship through his father. A derivative citizen is always born abroad (or has lost citizenship by reason of residence abroad, and regained it through the naturalization of his parent). The fact that defendant was born in Canada lends credence to his alleged statement that he acquired citizenship through his father. He could not have become a derivative citizen otherwise.

Further light on the error of the Court and the reason for the instruction given by the Court, is shown in the argument upon the motion for acquittal at the close of plaintiff's case. The Court stated (tr 138-139):

"There is admitted in evidence this exhibit, Exhibit 5, a writing signed by the defendant in which he said he was born at or near Alexandera, Ontario, Canada. That is his statement. If the jury accepts that statement as true, that establishes his citizenship right there, and establishes that he is not a citizen of the United States. Now, there is a legal presumption that a condition once shown to exist is presumed to exist as long as things of that nature exist. So, he has established himself by his statement as a citizen of a country other than the United States. Now, there is no presumption at all that I know of that one gains citizenship by reason of lengthy residence in the United States; no such presumption as that that I know of now exists. In answer to the question, 'I am a citizen or subject of,' he said, 'Uncertain, but last of Canada.' So he there again says that his last citizenship status that he knew about was that of a Canadian. He does say, 'Uncertain,' which means little to my mind, and certainly it doesn't mean that he believes he is a citizen of the United States. He doesn't say there he believes he is a citizen of the United States, but is uncertain about it. He said he was uncertain about his citizenship, the last he knew about it was he was a Canadian. Of course, it is true, and in my opinion, you are correct in your argument that if he came to this country when [119] he was 17 years old, and that is the evidence, and his father or mother came with him, and his father was thereafter naturalized, if he was under 21 years old at the time his father was naturalized, he became a citizen; but if, at the time of his father's naturalization, he was over 21 years of age, he would not become a citizen. But there is no presumption that I know of that his father came here and was naturalized. There is no presumption that he was naturalized while this man was under the age of 21 years, so as to grant to defendant the benefit of derivative citizenship through the citizenship of his father. In other words,

> the question is how far is the government required to go in its proof to exclude all hypotheses and all conjecture, no matter how extreme they may be. I don't think that the government, in order to make a prima facie case, is required to go to that length, is required to go to the length of showing whether the father of this defendant himself became a naturalized citizen of the United States, and further to show that if the father did become naturalized, he did not become naturalized during the minority of this defendant and while this defendant was residing in the United States."

It will be noted that the Court relied upon the presumption that a condition once shown to exist is presumed to exist as long as things of that nature last. This means that since it was shown that defendant was born in Canada, he was an alien, and that it is presumed that he continued as an alien until the contrary was shown. In other words, the burden was upon the defendant to show that he is a citizen.

We have already shown that the non-citizenship is an essential element of the offense charged, and that the presumption of innocense is a stronger presumption than that stated by the Court.

But how long do things of that nature last? Citizenship can be acquired by a residence of five years after a permanent entry. Derivative citizenship passes to the children under age residing in the United States. The charge is that the defendant stated that his father had been naturalized, and that he acquired derivative citizenship by reason thereof. That is the plaintiff's charge, and that is the plaintiff's evidence. What then becomes of the presumption. Is not the presumption overcome by the statement of the defendant, which is the very heart of plaintiff's case? We submit that it has been overcome; that the evidence, having estab-

lished that there had been a change in defendant's citizenship status, over-came the presumption and that it was then incumbent upon the plaintiff to establish defendant's lack of citizenship by direct proof of the lack of citizenship of his father.

An exact situation was presented to the Court in the case of Colt v. United States (CCA 5) 158 F. 2d. 641. In that case defendant was charged with falsely representing himself to be a citizen. The government proved that he was born in Rumania, and proved nothing further. Motion for acquittal was refused on the ground that it having been shown that defendant was born in Rumania, it was presumed that that condition continued to exist. The Circuit Court of Appeals in reversing the decision of the District Court stated:

> "The argument is that having been shown to have been born in Rumania and so not a citizen of the United States, it is *to be presumed* that this status continued in the absence of proof to the contrary, and Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628, is cited as being on the very point of citizenship. That, however, was a civil case where presumptions, especially for shifting the burden of going forward with the evidence, are quite frequently indulged. United States, ex. rel. Meyer v. Day, 2 Cir., 54 F. 2d. 336, is also cited, but that was a deportation case, and not a trial for crime. In a criminal trial the burden ordinarily never shifts. Sometimes by statute such presumptions are validly created in criminal cases, as in Mugler v. Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205; and in Yee Hem v. United States, 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904; but if arbitrary and unreasonable they may deny due process of law, as was held in Morrison v. California, 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. 664, also cited by appellee. It may be that if the criminal statute here involved had undertaken by creating a presumption of continued alien-

age to require one who is alien born to show naturalization as a defense, the presumption would be upheld as not arbitrary; but this statute is so worded as to require proof by the prosecution of non-naturalization. . . . Since there is no direct proof that Colt had not been naturalized, and the proven circumstances do not reasonable exclude but are consistent with naturalization, we are of the opinion that it cannot be said Colt's guilt is shown beyond a reasonable doubt."

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON CIRCUMSTANTIAL EVIDENCE

Specification of Error Nos. 17, 20 and 21.

The Court erred in refusing defendant's offered instruction No. 14, which reads as follows:

"The Court charges you that before you can convict on circumstantial [183] evidence the circumstantial evidence must be consistent with the guilt of the defendant upon trial and inconsistent with his innocence, and the evidence must be so strong, clear and conclusive as to the guilt of the defendant as to remove every other reasonable hypothesis except the defendant's guilt." (tr 206)

The evidence as to defendant's citizenship, or lack of the same is entirely circumstantial. The Court gave no instruction as to circumstantial evidence.

The only evidence as to defendant's citizenship was certain statements made by defendant. These did not directly state that defendant was an alien. In fact, exhibit 5 states that defendant was uncertain as to his citizenship. Aside from the question as to the corpus delicti, which has heretofore been discussed, it is submitted that an instruction as to circumstantial evidence should have been given, and that defendant's offered instruction is a proper one.

"To justify a conviction of crime on circumstantial evidence alone, the inferences to be derived from the established circumstances must be inconsistent with any

reasonable theory of innocence." Jones on Evidence, 4th Ed., Sec. 899, page 1681.

THE COURT ERRED IN DEFINING THE WORD FELONIOUSLY

Specification of Error No. 13.

The Court erred in refusing to give defendant's offered instruction No. 10, which reads as follows:

> "The word 'feloniously' is descriptive of the act charged. To establish that an act was done feloniously it must be shown that the act was done with a mind bent on doing that which is wrong, or, as it has been sometimes said, with a guilty mind." (tr 204)

The Court instructed the jury as follows:

> "The word 'feloniously,' as used in the indictment, means that if the things were done that it is charged in the indictment that the defendant did, then the defendant was guilty of an offense against the laws of the United States constituting a felony as distinguished from a misdemeanor." (tr 223)

Exception was taken to the definition given by the Court before the jury retired (tr 244).

It is respectfully submitted that the indictment having charged that the representations as to citizenship were made feloniously, the defendant was entitled to have the jury advised as to the correct definition of the term.

In State v. Connors, 37 Mont. 15-21, 94 Pac. 199, it is stated:

> "The word 'feloniously' is descriptive of the act charged. It means that the act was done with a mind bent on doing that which is wrong, or, 'as it has been sometimes said, with a guilty mind.'"

State v. Rechnitz, 20 Mont. 488, 52 Pac. 264, is to the same effect.

We submit that the defendant was prejudiced in this case because in the voir dire examination the jurors who

sat at the trial were interrogated as to whether or not, if the court should give an instruction such as the defendant proposed, the jurors would have any hesitancy in following it and they said that they would not (tr 48, 51, 54, 58, 59, 60, 61).

Accordingly, when the court declined to give an instruction which we submit correctly defines the word "feloniously," the jury could properly infer that the word "feloniously" had no particular significance.

THE COURT ERRED IN DEFINING THE WORDS "KNOWINGLY AND WILFULLY"

Specifications of Error Nos. 14, 15, 24.

The Court erred in refusing to give the defendant's offered instruction No. 11. This is assigned as error in specification No. 14. The offered instruction No. 11 reads as follows:

> "You are instructed that the word 'Wilful,' when applied to the intent with which an act is done or omitted, implies a purpose or willingness to commit the act. It means intentionally; that is, not accidentally." (tr 205)

The Court instructed the jury as follows:

> "The word 'Wilfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law or injure another, or to acquire any advantage." (tr 222-223)

The Court erred in refusing to give defendant's offered instruction No. 12. This is assigned as error in Specification of Error No. 15. The offered instruction reads as follows:

> "The word 'Knowingly,' as used in this indictment, means with guilty knowledge, that is deliberately and with knowledge and not something which is merely

careless, or negligent or inadvertent." (tr 205)

The Court defined the word "knowingly" in its oral charge as follows:

> "I charge you that the word 'Knowingly' — it is charged he did these things knowingly—the word 'knowingly' imports only knowledge that the facts existed which bring the act or omission within the provisions of the law. It does not require any knowledge of the unlawfulness of such act or omission." (tr 222)

Exception was made to the definition before the jury retired (tr 242), and it is assigned as error in Specification No. 24.

We submit that the offered instructions should have been given in order that the jury might be clearly advised that guilty knowledge and an intent to defraud were essential elements of the crime charged.

In Browder v. United States, 312 U. S. 335, 85 L. Ed. 862-867, in a criminal prosecution for the unlawful use of a passport the court said:

> "Read in its context the phrase 'wilfully and knowingly,' as the trial court charged the jury, can be taken only as meaning 'deliberately and with knowledge and not something which is merely careless or negligent or inadvertent.' "

In Screws v. United States, 325 U. S. 91, 89 L. Ed. 1495-1502, the court said:

> "We recently pointed out that 'wilful' is a word 'of many meanings, its construction often being influenced by its context.' At times, as the Court held in United States v. Murdock, 290 U. S. 389, 394, 78 L. Ed. 381, 384, 54 S. Ct. 223, the word denotes an act which is intentional rather than accidental. And see United States v. Illinois C. R. Co., 303 U. S. 239, 82 L. Ed. 773, 58 S. Ct. 533. But, 'when used in a criminal statute it generally means an act done with a bad purpose.' In that event something more is required than the doing of the act prescribed by the statute. Cf. United States v. Bal-

int, 258 U. S. 250, 66 L. Ed. 604, 42 S. Ct. 301. An evil motive to accomplish that which the statute condems becomes a constituent element of the crime. Spurr v. United States, supra (174 U. S. p. 734, 43 L. Ed. 1152, 19 S. Ct. 812); United States v. Murdock, supra (290 U. S. p. 395, 78 L. Ed. 385, 54 S. Ct. 223). And that issue must be submitted to the jury under appropriate instructions. United States v. Ragen, 314 U. S. 513, 524, 86 L. Ed. 383, 390, 62 S. Ct. 374."

We contend that in this case if the indictment is held sufficient nevertheless the government must show a criminal intent and that such intent was negatived by the instructions given by the court.

THE COURT ERRED IN ITS DEFINITION OF THE WORD "FALSELY"

Specification of Error No. 16.

The Court erred in refusing to give the defendant's offered instruction No. 13, reading as follows:

"The word 'Falsely' as used in this indictment means something more than an untruth and includes perfidiously or treacherously or with intent to defraud." (tr 205)

The Court instructed the jury with respect to the word "falsely" as follows:

"The word 'falsely'—it is charged that the representation was made falsely—that always imports a fraud, and the word 'falsely' as used in the indictment as describing the representation as to citizenship alleged to have been made by the defendant, means a representation made that is not true and that the party making it knows it is not true at the time it is made, and the party who makes it makes it at the time for the purpose of having the one to whom it is made believe it and accept it as true and act upon it as true, to the advantage and benefit of the one making it. When I say advantage to the one making it, it doesn't mean financial or monetary benefit, it means every kind of benefit which the one

making it thinks will accrue to him by reason of making the statement." (tr 223)

Exception was made to the definition before the jury retired, as follows:

"Mr. Acher: On the word, 'Falsely,' we except to the charge as failing to include as a part of the significance of the word a fraudulent or criminal intent.

The Court: I said the word 'falsely' involved fraud.

Mr. Acher: Perhaps, I was following it and I thought—maybe my recollection is wrong.

The Court: Maybe you better go ahead and take an exception.

Mr. Acher: I just want to call attention to another case, that it requires a fraudulent or criminal intent, 31 Federal 68, U. S. v. Otis.

The Court: Don't you think if one deliberately misstates a fact that he knows to be untrue for the purpose of having another accept it and act on it as criminal intent if the law makes it so?

Mr. Acher: That is what we object to, your Honor, the fact that a civil definition would not be sufficient. It is our contention—(interrupted)

The Court: It is not a civil definition, or if it is, it applies equally to the criminal law.

Mr. Acher: It is the rule followed in estoppel.

The Court: I think fraud is fraud whether it is in civil court or criminal court, and that is simply a definition of fraud." (tr 243)

The definition proposed by the defendant was taken from the language of the Circuit Court of Appeals from the second Circuit in United States v. Achtner (CCA 2) 144 F. (2d) 49, 52, where the Court said in considering the construction of the word "falsely" under the same statute here involved:

"Thus, it is said that the word 'falsely,' particularly in a criminal statute, suggests something more than a mere untruth and includes 'perfidiously' or 'treacherously.'"

THE COURT ERRED IN HOLDING CORROBORATION UNNECESSARY ON THE THIRD COUNT

Specification of Error No. 19.

The Court erred in refusing to give the defendant's offered instruction No. 21 set forth in the appendix, pages 57-58, to the effect that under the third count of the indictment each essential element of the case must be proved by the testimony of two witnesses or of one witness and corroborating circumstances.

Specification of Error No. 26.

The Court erred in its oral charge that the direct evidence of one witness entitled the full credit was sufficient for proof of any fact embodied in the case (tr 225) to which objection was made before the jury retired (tr 244), which is set forth in the appendix, pages 57-58.

In the third count of the indictment it is alleged that the defendant "having been first duly sworn as a witness did wilfully and knowingly testify" falsely as to his citizenship (tr 4). Since the indictment charges that the false statements were made under oath we respectfully submit that the evidence of one witness was insufficient to sustain this count. Thus, in Fotie v. United States (CCA 8) 137 F. (2d) 831, where the charge was making a false statement under oath, the court concluded that perjury was charged and said:

"The charge here is the *falsity of an oath and not* the falsity of a statement as was the case in the first indictment. The requirements of proof to warrant a conviction are correspondingly greater. Warszower v. United States, supra. To sustain a conviction of perjury the burden was upon the government to prove the essential

elements of the crime charged by substantial evidence excluding every other hypothesis than that of guilt. . . . United States v. Norris, 300 U. S. 564, 574, 57 S. Ct. 535, 539, 81 L. Ed. 808. 'To convict a person of perjury, probably or credible evidence is not enough.' Phair v. United States, 3 Cir., 60 F. Ed. 953, 954. It is uniformly held by the federal courts that an uncorroborated oath is not enough to establish the falsity of an oath as to which perjury is charged. Goins v. United States, 4 Cir., 99 F. 2d. 147. The allegation that the testimony of one charged with perjury was false and that the appellant did not believe it to be true when he gave it under oath must be established by two witnesses or by one with circumstances of sufficient corroboration. Boehm v. United States, 8 Cir., 123 F. 2d. 791, 809, 810; Hart v. United States, 9 Cir., 131 F. 2d. 59, 61; United States v. Palese, 3 Cir., 133 F. 2d. 600, 602. The only evidence in support of the charge in this count of the second indictment is the proof of prior inconsistent admissions and contradictory statements of the appellant. But, in proving these admissions, the government also proved the qualifications and explanations which accompanied the great majority of them, and at the same time introduced incompetent and prejudicial testimony mentioned in the discussion of the first indictment. Under the authorities, the conviction of perjury obtained upon this character of evidence can not be permitted to stand."

The trial court held that the allegations that the defendant testified under oath would be disregarded as surplusage (tr 111). We submit that the indictment, having charged a false statement under oath, must be construed as seeking to charge perjury, and for that reason corroboration was necessary.

THE COURT ERRED IN EXCLUDING EVIDENCE WITH RESPECT TO KNOWLEDGE, INTENT AND MOTIVE, AND IN ITS CONSIDERATION OF THE EVIDENCE AND INSTRUCTION OFFERED ON THIS SUBJECT

Specification of Error No. 10.

"The Court erred in excluding the evidence contained in offers of proof 1, 2, 3 and 5, all made while the witness Paul W. Smith was on the stand, relating to the circumstances under which the applications for liquor licenses were considered by the Montana Liquor Control Board, these offers of proof being set forth in the appendix to this brief, pages 55-57."

Specification of Error No. 12.

"The Court erred in excluding from evidence certain minutes of the Stockmen's Club, a corporation, contained in proposed exhibits 17, 18, set forth in full in the appendix hereto, pages 59-60."

Specification of Error No. 18.

The Court erred in refusing to give defendant's offered instruction No. 16, as follows:

"You are instructed that if the evidence fails to show any motive on the part of the accused to commit the crime charged in the indictment, this is a circumstance in favor of his innocence which the jury ought to consider, together with all the other facts and circumstances, in making up their verdict."

Specification of Error No. 28.

"The Court erred in its oral charge to the jury in stating that the defendant knew that in order to do business he applied for a liquor license himself and was to hold it for two years until the club became qualified (tr 238) to which objection was made before the jury retired (tr 244-245) as set forth in the appendix, pages 59-60."

Specification of Error No. 29.

"The Court erred in overruling the exceptions made

to the remarks of the Court during the course of the argument of the case to the jury (tr 211-212) as set forth in the appendix, pages 60-61."

The foregoing assignments of error all in effect relate to a single proposition and will be discussed together.

The evidence discloses that on October 14, 1944, a corporation, known as the Stockmen's Club, was organized under the provisions of Chapter 42 of the Civil Code of Montana (tr 163). This statutory provision authorizes the incorporation of non-profit corporations for charitable, benevolent or fraternal purposes (Secs. 6453-6461 RCM 1935).

The defendant, L. P. De Pratu, was President; Luella Lundby was Vice President, and Emma Lundby was Secretary-Treasurer of the corporation (tr 166). The two Lundby sisters were both citizens of the United States (tr 178).

The theory of the defense is outlined in the opening statement of counsel for defendant as follows:

"Mr. Acher: May it please the Court, counsel, ladies and gentlemen of the jury, the defendant in this case expects to prove that in 1944 an application was filed with the Secretary of State of the State of Montana, and a charter was issued to the Stockmen's Club, a non-profit organization, having clubrooms in Great Falls near the Northern Montana State Fair grounds. We expect to prove and it will be developed, that under the liquor and beer laws of Montana, a club is not entitled to sell beer or liquor until they have been in existence a certain number of years, one or two, I am not clear myself. The statutes say one in one place and two in another. In any event, the evidence will show that following the formation of this club as a corporation organized under the laws of Montana, a building was constructed. It took over a period of a year or more, building this building, and that about the time it was

ready for occupancy, application was made for beer and liquor license for this establishment.

"The evidence will show that the defendant, Mr. De Pratu, had been in the restaurant and hotel business for many years . . . this Club idea was conceived and carried into execution, and an application was filed for a beer and liquor license, presented through Mr. Sherman Smith, a lawyer, no relation to Paul W. Smith, attorney for the liquor Control Board, who rejected the application on the ground that the Club wasn't in existence a sufficient length of time. We expect to show that notwithstanding that fact, it was suggested a license could be issued to one of the individuals, and that without a new application a license was issued to Mr. De Pratu.

"That Mr. De Pratu was not intending to represent anything about his citizenship, and that the idea of the application was for the Stockmen's Club and not for Mr. De Pratu." (tr 140-141)

While the witness, Paul W. Smith, attorney for the Montana Liquor Control Board, was on the stand, on direct examination he testified:

"Q. I ask you to look at plaintiff's Exhibit 1 and plaintiff's Exhibit 2, particularly at the name of the applicant and the signature, and I will ask you did you have anything to do in your official capacity with the applications or with any licenses issued pursuant thereto? A. Yes, sir, I did." (tr 71)

Upon cross-examination the defendant sought to prove by offers of proof Nos. 1, 2, 3 and 5 that the applications for liquor licenses, upon which counts 1 and 2 of the indictment are based, were considered as applications of the Stockmen's Club and not as applications by De Pratu individually. These offers of proof were rejected.

The witness Paul W. Smith was recalled by the defendant. He testified that the applications for licenses were not presented directly by De Pratu, but by an attorney, Sherman W. Smith (tr 144). He testified:

"A. I told Sherman Smith and also Mr. Buley, who was administrator for the Board, that the Stockmen's Club could not hold a liquor license because it had not been organized prior to two years before making application to the Board, which was the Montana law." (tr 145)

It was developed that before liquor licenses could be issued, an applicant must first have a beer license (tr 79).

It will be noted that in Exhibits 1 and 2 the two liquor applications state:

"L. P. DE PRATU
(Full names of all applicants for this license. Please print or type.)
THE STOCKMEN'S CLUB
(Trade name which applicant, or applicants, intend to call such business.)
TO MONTANA LIQUOR CONTROL BOARD:

I hereby apply for a Retail Liquor License and under oath make the following statements and answer the following questions, to-wit:

(1) State in what capacity you make this application:
PRESIDENT & MANAGER
(State whether owner, partner, or if corporation, state your office, if in any other capacity.)" (tr 75-77)

It will also be noted that in the beer application in evidence (Exhibit 3) the application states:

"THE STOCKMEN'S CLUB
(Trade name which applicant, or applicants, intend to call such business.)
TO MONTANA LIQUOR CONTROL BOARD:

I hereby apply for a Retail Beer License and under oath make the following statements and answer the following questions, to-wit:

(a) State in what capacity you make this application:
CORPORATION

(State whether owner, partner, or if corporation, state your office, or any other capacity.)" (tr 158)

That it was the intention of the defendant De Pratu to make applications for the Stockmen's Club and not as an individual, we contend was reflected by the corporate minutes excluded from evidence.

Minutes of the corporation were introduced showing that on September 1, 1945, at a meeting of the Board of Directors, as follows:

> "The said L. P. De Pratu thereupon offered to obtain slot machine licenses in accordance with the laws of the State of Montana and beer and liquor licenses for said establishment in accordance with the laws of the State of Montana and to pay for same personally, providing he would be secured at some future date for said expenditure.
>
> "Upon motion duly made, seconded and carried, the said L. P. De Pratu was thereupon directed to obtain said licenses as above set forth." (tr 167)

However, Minutes of February 20, 1946 (Exhibits 17 and 18), in which it was reported that a State Liquor License had been secured were excluded from evidence (tr 169). We submit that Exhibits 17 and 18 afford some evidence that De Pratu was getting licenses for the Corporation and not for himself.

In the oral charge to the jury the court said that the defendant knew that in order to do business he applied for a liquor license himself since the club could not hold a license until it had been in existence two years (tr 238).

Exception was made to this charge (tr 245). The court then said that such was shown by the opening statement of counsel to the defendant to the jury (tr 245). Counsel then stated:

"Mr. Acher: I understood he filed the applications for the club and they wouldn't issue it to the club, and my offers of proof were designed to show that nevertheless the Board did issue it to him." (tr 245)

We submit that the record shows that counsel's criticism of the courts statement is justified by the record.

The defendant suffered prejudice in that the defense that the application was not intended to represent anything as to De Pratu's citizenship was virtually withdrawn from the jury.

Furthermore, the record shows that the other two incorporators of the club were citizens (tr 179). There was no need for De Pratu to make the application. Therefore, the Court by refusing to give offered instruction No. 16, in which it is stated that the absence of motive might be considered by the jury, also prejudiced the defendant.

The instruction offered was held to be a correct statement of the law in State v. Lu Sing, 34 Mont. 31, 39, 85 Pac. 369.

In 23 C. J. S. Sec. 1198, the rule is stated:

"Where the facts and evidence of the particular case require it, the jury should be instructed properly as to motive and the absence of motive."

The Court also refused to permit Counsel to argue to the jury that the application was treated by the Liquor Control Board as a Club application. We submit that it can fairly be inferred that the application was considered as an application by the club because Mr. Smith, the Board's attorney, gave the opinion that a license could not be issued to the club. If the application had been treated as made for De Pratu individually, surely Attorney Paul W. Smith would have had no occasion to say the club could not get a license. In other words, it is our contention:

(a) That the corporate minutes excluded from evidence were of evidentiary value to show that the defendant was not applying for a license as an individual but for the club.

(b) That the excluded testimony of Paul Smith, attorney for the Liquor Control Board, tended to show that the application was considered as being made by the club and not De Pratu.

(c) That the offered instruction on motive should have been given, since it could fairly be argued that there was no purpose in De Pratu making the application as an individual at all, if he were not a citizen, as the other two officers of the Stockmen's Club were citizens.

(d) That the court's instructions that De Pratu knew the club could not get a license and so applied individually is not based on evidence or upon the statement of Counsel for the defendant as shown by the record.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be reversed for the following reasons:

One

That the indictment fails to charge a public offense.

Two

That the evidence is insufficient to sustain a judgment of conviction, and particularly to substantiate the charge that the defendant falsely claims United States citizenship.

Three

That the presumption of innocence was overruled by the court in favor of one of the presumption of the continuance of a state of facts.

Four

That the corpus delicti was proven only by statements made by the defendant.

FIVE

That the Court erred in instructing the jury that the appellant, having been born in Canada, was a citizen of Canada and an alien to the United States, and that this condition was presumed to continue until the contrary was shown.

SIX

The Court erred in refusing to give the jury instructions on derivative citizenship.

SEVEN

That the Court erred in refusing to give the jury instructions on circumstantial evidence.

EIGHT

That the Court erred in defining the words feloniously, knowingly and falsely, and that the Court erred in holding that corroboration was unnecessary on the third count.

NINE

That the Court erred in excluding evidence with respect to knowledge, intent and motive.

IT IS THEREFORE respectfully submitted that because of the foregoing the judgment of the District Court should be reversed.

Respectfully submitted,

CHARLES DAVIDSON
ARTHUR P. ACHER
Attorneys for Appellant

APPENDIX

Specification of Error No. 10.

The Court erred in excluding the evidence contained in offers of proof 1, 2, 3 and 5, as follows:

Offer of Proof No. 1

"Q. I will ask you, Mr. Smith, whether or not, is it not a fact that the plaintiff's Exhibit 2 was referred to you in your official capacity shortly prior to February 16, 1946, by Mr. Buley, the administrator for the Montana Liquor Control (69) Board, for an opinion as to whether or not a license could be issued to the Stockmen's Club?" (tr 85)

"Defendant's offer of proof No. 1: The defense offers to prove by the witness on the stand that he would have answered the question, to which objection has been made, in the affirmative.

"Mr. Pease: The Government objects to the offer of proof, first, on the ground that the matter is irrelevant; second, on the ground it is improper cross-examination and a part of the defendant's case in chief.

"The Court: Well, the offer of proof will be filed as defendant's offer of proof No. 1 by the Clerk and the objection will be sustained." (tr 86)

Offer of Proof No. 2

"Q. In giving that opinion, did you treat plaintiff's Exhibit 2 as an application by L. P. De Pratu or as an application by the Stockmen's Club?" (tr 88)

"Defendant's offer of proof No. 2: The defense offers to prove by the witness on the stand that he treated the application as that made by the Stockmen's Club.

"Mr. Pease: Objected to on the same grounds as stated in the last previous objection, particularly that the matter which is the subject of the offer is a matter of record, that the answer, if given, would not be the best evidence for that reason, and that the same is no part of the proper cross-examination of this witness, and if proper at all would be matter to be offered as part of the defense of the case.

"The Court: The offer will be filed as defendant's offer of proof No. 2, and the objection will be sustained."

OFFER OF PROOF NO. 3

"Q. Is it not a fact, Mr. Smith, that you advised Mr. Buley that the application could not be granted to the Stockmen's Club because they had not been in existence as a club for a sufficient length of time and that—(interrupted)"

"Mr. Pease: The question is objected to on the same grounds as stated in the objection to the last preceding offer of proof on the part of the defendant.

"The Court: Objection is sustained. It is hearsay also.

"Defendant's offer of proof No. 3: The defendant offers to prove that the witness would have answered the question in the affirmative.

"Mr. Pease: To the defendant's offer of proof No. 3, the Government objects on the same grounds as stated to the last question on cross-examination.

"The Court: The offer of proof will be filed and the objection will be sustained." (tr 89-90)

OFFER OF PROOF NO. 5

"Q. Is it not a fact, Mr. Smith, that the citizenship of Mr. L. P. De Pratu as an individual was not considered in connection with plaintiff's Exhibit 2 when you gave your decision as to the application?

"Mr. Pease: Objected to on the ground that it would be not the best evidence; it would be a matter or record; it is improper cross-examination; if relevant at all, it is part of the defense in the case, and isn't relevant as such.

"The Court: It is entirely immaterial whether it was or was not considered by the Board. It is a matter extraneous to this case. The question here before the jury, and the only question here is whether or not the defendant represented himself to be a citizen as set out in the indictment, and whether or not, if he did, that representation is true. That is the charge and that is the question here. The objection will be sustained. . . . "

"Defendant's offer of proof No. 5: Defendant offers to prove that the witness would have answered yes.

"Mr. Pease: The Government objects to the offer of proof numbered 5 on the same grounds as stated in the last objection, the objection to the last question.

"The Court: The offer of proof will be filed, and the objection will be sustained." (tr 91-92)

Specification of Error No. 19.

The Court erred in refusing to give the defendant's offered instruction No. 21, reading as follows:

"You are instructed that under the third count of the indictment each essential element of the case must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances, and it is not sufficient where the testimony of two witnesses testified to different elements of the crime charged, but the law requires in such case that two witnesses testify to each of the essential elements of the crime charged or that one witness has testified directly to such element and that the testimony of such witness is corroborated by the circumstances.

"It is, therefore, necessary for you to understand what is meant by the word 'corroborate' and 'corroboration.' To corroborate means to strengthen; to make more certain; to add weight or credability to a thing; to confirm by additional security; to add strength. Evidence which does any of these things is evidence which corroborates, and is corroborating evidence. It does not mean facts which, independent of the evidence being corroborated, will warrant a conviction, but it is evidence which tends to prove the defendant's guilt independent of the evidence which is corroborated." (tr 208-209)

Specification of Error No. 26.

The Court erred in the oral charge to the jury, as follows:

"The direct evidence of one witness entitled to full

credit is sufficient for proof of any fact embodied in this case." (tr 225)

to which objection was made, as follows:

"Mr. Acher: We except to the language of the Court that the direct evidence of one witness entitled to full credit is sufficient to prove any fact in this case upon the ground that count 3 contemplates a charge of making false statements under oath, and under the authority of Fotie v. United States, 137 F. 2d. 831, which distinguishes the Warszower-United States Supreme Court case—(interrupted)

"Court: Wasn't that a perjury case?

"Mr. Acher: They said it was a false statement and I am preserving the record. That is perjury in that they said it was a false—(interrupted)

"The Court: You have preserved it sufficiently. If I considered he was charged with perjury under the third count, I would have granted the motion to dismiss, but, as I view it, there is no charge of perjury and he has not been prosecuted for perjury." (tr 244)

Specification of Error No. 12.

The Court erred in excluding from evidence certain minutes of the Stockmen's Club, a corporation, as follows:

"(Exhibits 17 and 18, offered by the defendant, were here denied admission in evidence, and are as follows:)

Exhibit 17

'Minutes of Special Meeting of Board of Directors of the Stockmen's Club, held on Wednesday, February 20th, 1946.

'Pursuant to law and waiver of notice heretofore made, there were present Emma Lundby, Louella Lundby, and L. P. De Pratu in the clubhouse of said club in the city of Great Falls, on Wednesday, February 20th, 1946.'

Exhibit 18

'Whereupon, L. P. De Pratu reported to the meeting that he had duly obtained slot machine licenses for the

operation of eight slot machines, a State liquor license, a State beer license, a Cascade County liquor license, a Cascade County beer license, a City of Great Falls liquor license and a City of Great Falls beer license, together with the United States Government federal excise stamps and all of the necessary licenses issued by the State of Montana to operate a restaurant in connection with said club.

'Thereupon, by motion duly made, seconded and carried, the meeting confirmed all of the acts and actions of the said L. P. De Pratu.' (tr 169-170."

Specification of Error No. 28.

The Court erred in its oral charge to the jury, as follows:

"as I understand the testimony, the testimony of the witness is that the Stockmen's Club, although not a qualified applicant, it desired to do business, to sell liquor, and it is said here, as I understand the testimony of the defendant's witnesses themselves, that the defendant knew that, that in order to do business that he applied for a liquor license himself and was to hold it for the two years until the Club became qualified. So, what does that lead to? There had to be a liquor license issued under the laws of the State before the Club could legally sell liquor. They had to get it through deceit on behalf of the defendant because the Club could not hold a license, and he, as an incorporator, as a director, a stockholder and part owner of the corporation with two others, desired this business to be done and to do it under any circumstances." (tr 238)

Exception was made to the charge, as follows:

"Mr. Acher: We except to the language of the Court to the effect that it is suggested that the defendant knew the club could not get a license when the application was filed.

"The Court: It was your opening statement to the jury, that has been your contention all the way through. It was your opening statement to the jury that the cor-

poration could not get a license, and the defendant knowing that made arrangements to get the license.

"Mr. Acher: I understood he filed the applications for the Club and they wouldn't issue it to the Club, and my offers of proof were designed to show that nevertheless the Board did issue it to him.

"The Court: You know, as a matter of law, the Board couldn't do anything else but what it did do because the corporation was not qualified." (tr 244-245)

Specification of Error No. 29.

"The Court erred in overruling the exceptions made to the remarks of the Court during the course of the argument of the case to the jury (tr 211-212)."

In the oral argument the following occurred:

Mr. Acher made the opening argument on behalf of the defendant, during which argument the following transpired:

"Mr. Acher: . . . was considered by Mr. Smith as an application on behalf of the Stockmen's Club. (interrupted)

"The Court: Confine yourself to the evidence. No such evidence was permitted in the case. Objections were constantly sustained to that line of testimony. Confine yourself to the evidence. (tr 211)

"Mr. Acher: If the Court please, in connection with my argument and interruption by the Court, I have had a transcript prepared and submitted to your Honor. I would like to note an exception to the Court's remarks in view of the record.

"The Court: Well, yes, you may have an exception to the Court's remarks, but the Court's remarks will stand. The answer of the witness was that he 'told Sherman Smith and also Mr. Buley the Stockmen's Club could not hold a liquor license because it had not been organized prior to two years, before making application.' That is the answer of the witness. It forms no basis for your argument that it was considered by Mr. Smith as an application on behalf of the Stockmen's

Club. Mr. Smith never said that, it wasn't contained in his answer, so your argument was not based on the evidence. You may have an exception to the remarks made to your argument, and to the remarks I make now in the presence of the jury." (tr 212)

No. 11842

United States
Circuit Court of Appeals
for the Ninth Circuit

LOUIS RAPHAEL DE PRATU,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

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Billings, Montana;

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Butte, Montana;

EMMETT C. ANGLAND,
Assistant United States Attorney,
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Attorneys for Appellee.

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INDEX OF SUBJECTS AND LAW POINTS

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BRIEF OF APPELLEE

SUMMARY OF FACTS.

Appellant's fact statement is considered inadequate, hence this summary.

In support of the three counts of the indictment it was incumbent to prove (a) that on three occasions appellant represented himself to be a citizen; (b) that on all said occasions he was an alien; and (c) that he acted knowingly and 'falsely'.

That appellant did represent himself to be a citizen does not seem to be controverted; nor that he did so knowingly. The government's case is disputed only as to its proof of the falsity of the representations.

All three claims of citizenship, which are the subject of the indictment, were made in the year 1946. At that time De Pratu was in the management and control of a saloon at Great Falls, Montana, known as the Stockman's Club. The business was incorporated and DePratu was the President and principal investor. (The corporation was a 'non-profit' concern and was said to be "indebted" to DePratu in the sum of $20,000.00. In September, 1945, "the said L. P. DePratu, thereupon offered to obtain slot machine licenses in accordance with the laws of the State of Montana and to pay for same personally, providing he would be secured at some future date for said expenditure." R. 166-167, etc.)

The corporation had not been organized a sufficient length of time to obtain a liquor license. (R. 140-145.) Accordingly, on January 15, 1946, DePratu personally applied for a Montana retail liquor license and obtained such license. (R. 77.)

Again on June 27, 1946, he similarly, and personally, applied for and was granted a Montana retail liquor license. The forms which he signed contained full instructions, including a dotted line bearing the designation

("Full names of all applicants for this license. Please print or type.")

In each of said applications appears:

"Are you a citizen of the United States? Yes."

Each application was sworn to before a Notary Public. Each was filed with the Montana Liquor Control Board, and both contain endorsements showing that appellant obtained the license applied for. (R. 75-78.)

In further prosecution of the business in question appellant in September, 1946, was interested in importing a musician named Gonzy to appear at the Stockman's Club in Great Falls. (R. 130.)

On September 11, 1946, in Sweet Grass, Montana, a port of entry to the United States, three immigration inspectors, including the witness, Arthur Matson, had certain proceedings with reference to the eligibility of Gonzy to be admitted into the United States. Appellant appeared before the Board and testified among other things that he was himself a citizen of the United States. (R. 125-126-129.) He also at this time made the claim that "they told me I was under age and that I was a citizen", apparently referring to his early years. Appellant in the year 1946 was the age of sixty-eight years. He had spent the last fifty years of that time in the United States. (R. 97.) He was and had been in business at Great Falls, Montana, and a resident in that city for twenty years prior to the time of trial. (R. 160-161.)

Exhibit No. 6 is a duly authenticated certificate, the body of which reads as follows:

"April 10, 1947.

CERTIFICATE OF NON-EXISTENCE OF NATURALIZATION RECORD

I, Henry Colarelli, hereby certify to the fol-

lowing:

1. That I am Chief of the Information, Mail and Files Section, Office of Administrative Services, of the Central Office, Immigration and Naturalization Service, United States Department of Justice, and by virtue of such position and the authority thereof, that I am custodian of all records of the Central Office of the United States Immigration and Naturalization Service, including any and all naturalization records required to be filed with the Commissioner of Immigration and Naturalization pursuant to Section 337, Nationality Act of 1940 (8 U.S.C. 737) and pursuant to the similar requirements of the Act of September 27, 1906 (43 Stat. 596) in effect prior thereto.

2. That I have caused diligent examination and search to be made of said records, and that there does not appear therein any record filed pursuant to the foregoing statutes nor any record whatsoever evidencing the naturalization of one Louis Raphael DePratu or Louis Patrick DePratu.

(Seal) /s/ HENRY COLARELLI,
Chief, Information, Mail
and Files Section."

(R. 99-100.)

Witness Frank S. Nooney was a federal official, to-wit: Assistant to the Operations Officer in the Spokane Office of the Immigration and Naturalization Service. That office has the official records for the States of Montana and Idaho, that part of Washington east of the Cascade Mountains, and the five Northeast counties of Oregon. This was a territory, of course, within which appellant had lived for some twenty years. Witness Nooney testified (R. 104-105)

that he had made a search to determine whether the appellant was ever naturalized as a citizen of the United States and that he had found no record of such naturalization. Witness stated, however, that he did have a record of the non-naturalized aliens residing within the territory mentioned and that Louis Raphael DePratu or Louis Patrick DePratu was recorded as an alien.

On February 8, 1936, the appellant applied for registration as an alien in the following words:

> "I Louis Raphael DePratu, Gillman, Montana, **an alien,** believing that there is no record showing that I am now a lawful permanent resident of the United States, hereby request that under the provisions of the Act of Congress approved March 2, 1929, a record of registry of my arrival in the United States be made." (R. 102.)

On November 16, 1940, appellant executed and caused to be filed an instrument of registration. Exhibit 5. (R. 96-98.) This was entitled in the United States Department of Justice, Immigration and Naturalization Service, as "ALIEN REGISTRATION FORM" and contains the statement that he is a citizen or subject of

"Uncertain, but last of Canada."

It also states that he was born in Alexandera, Ontario, Canada. The instrument is sworn to before a Registering Official.

No evidence whatever was offered on the issue of citizenship in behalf of defendant. Defendant did not

take the stand. The only testimony offered was concerned with the operation of the Stockman's Club in a seeming attempt to prove that appellant was not applying for a liquor license for himself on the two occasions in question, but for the corporation. Many portions of the corporation minutes were offered and some of them admitted by the court, which had no tendency to show anything except that the liquor licenses were desired for the business of the corporation. Nothing in these minutes had any tendancy to show that DePratu did not knowingly and intentionally sign the applications which are in evidence. They were apparently offered in support of a defense theory that DePratu would not be guilty of the crime charged if he intended to obtain the liquor licenses by a subterfuge instead of by an outright application by the ineligible corporation itself. The trial court repeatedly called attention to the weakness of this theory.

No evidence was introduced in any wise seeking to supplement, correct or impeach the certificate of non-existence of naturalization record. (Exhibit 6.) No evidence rebutting or touching the testimony of witness Nooney and his records at Spokane, Washington, was offered. No evidence was introduced impeaching or tending to impeach the integrity of the instruments in which DePratu alleged himself to be a citizen. No evidence whatever was offered on the transaction before the Immigration Officials at Sweet Grass, Montana, in September, 1946. Accordingly

the government's evidence went to the jury entirely unchallenged in all respects and as to every material issue.

SUFFICIENCY OF INDICTMENT.

All three counts of indictment are questioned by appellant on the ground that the same do not sufficiently allege a fraudulent scheme or plan on the part of the accused.

In approaching the question the court will not fail to observe that the old statute now repealed, 18 U.S.C. 141, contained as one of the elements of the corpus delicti the phrase,

"for any fraudulent purpose whatever".

Whereas the present section of the Nationality Code under which this indictment was drawn omits such phrase. The difference between the two statutes is noted and discussed in United States v. Achtner, 144 F. (2d) 49. This is conceded by appellant's counsel on pages 13 and 14 of his brief.

Whatever may have been the requirements in the matter of pleading a specific fraudulent purpose under 18 U.S.C. 141, we are quite content with the interpretation in United States v. Achtner. The only requirement, as we understand it, is that the indictment disclose and the proof establish that the false claim of citizenship was not made in jest or in empty boasting, but was made seriously to a person having a right to inquire. The three counts of this indict-

ment all comply with that rule.

Count 1 and Count 2, identical except for the date, allege that the claim of citizenship was made

> "in an application for a retail liquor license under the laws of the State of Montana, filed by him with the Montana Liquor Control Board."

This is certainly a compliance with the rule that the statement was deliberately and seriously made in answer to a question propounded by one who had a right to ask it. The Montana Liquor Control Board and the laws of Montana under which it operates and under which it issues liquor licenses are all matters of judicial cognizance by the Courts of the United States and do not, of course, require to be pleaded in an indictment. Chapter 84, Ll. Montana 1937, Sec. 3, Sec. 5 and Sec. 10. See appendix.

The indictment states the facts from which the inference of fraud arises; viz., that DePratu sought to obtain a liquor license by making a false statement that he was a citizen. **The laws of Montana require that licensees be citizens of the United States.** It is submitted that if the indictment had set forth verbatim a copy of the written application for liquor licenses, not only would the indictment be no better, but would offend against the provisions of Rule 7 (c) of the Rules of Criminal Procedure by making it prolix and full of surplusage.

Count 3 complies with the rule. It alleges that the

false claim of citizenship made at Sweet Grass, Montana, on September 11, 1946, was made.

> "before a board of special inquiry of the Immigration and Naturalization Service of the United States, having been first duly sworn as a witness,"

and further states that the defendant

> "did wilfully and knowingly **testify** in part as follows:",

following with the alleged false statement charged in Count 3.

Here again we have the allegation of facts, which disclose that the claim of citizenship was made not in jest or in idle boast, but made deliberately and seriously in answer to a question propounded by a person who had a right to ask. It does not seem to the writer that the court needs a blue print of the plan of this count of the indictment to show its sufficiency in respect of the attack made by appellant. It may be emphasized, however, that one who is sworn, and who testifies, and who does so before officers of the United States, is not engaged in jest or in boasting, and there is no room for construction of Count Three to that effect. There is certainly the plain intendment by the language used that the officers of the Immigration Service were engaged in official business, and that they had the right to ask the question which the appellant falsely answered.

The case of United States v. Weber, 71 F. Supp. 88 (Dist. Ct. N. D. Ill.) is cited with the claim that it sup-

ports the appellant's contention. There are several answers which may be made.

It is not difficult to distinguish the Weber case on the facts. The indictment held to be insufficent merely stated that the representation was made to the "Andrew Company of Chicago and to its officers," without disclosing any facts as to the purpose of asking the question or making the representation. In other words, the specific averments of fact, for lack of which the Chicago court held the indictment bad, are fully contained in the present indictment.

District Judge Sullivan in his opinion cites and purports to follow United States v. Achtner, 144 F. (2d) 49, and so, in our judgment, if his actual decision may be considered as going beyond the rule declared in the Achtner case, it must be deemed in conflict with it. That it does go beyond the Achtner case, at least in its dicta as to the true ruling of pleading, we think quite obvious. District Judge Sullivan quotes with approval some ancient decisions from the state jurisdiction of Illinois in support of his ruling of which two examples can be given here:

People v. Hobbs, 352 Ill. 224, 185 N.E. 610:

The indictment was held bad because in charging embezzlement against the Treasurer of "Johnson City Relief Association, a voluntary association of individuals", the indictment did not state the names of all the individuals composing the association (!)

Wallace v. People, 63 Ill. 451:

Indictment charging larceny of property of "American Merchants Union Express Company", failed to state that the company was a corporation.

However meritorious may have been the logic and however salutary may have been the practice in the day when that kind of decision was current in the courts, it is manifest that the Rules of Criminal Procedure, particularly Rule 7 (c), were intended once and for all to abolish the fiction that a defendant's rights are prejudiced by such alleged defects. (Rule 7 (c) is in appendix).

In the last section of District Judge Sullivan's opinion, page 91, he sets forth that the defendant would be prejudiced by the failure of the indictment to state whether "the Andrew Company is a partnership or a corporation". He goes on to say that it should be stated in the indictment who the members of the partnership were, if it was a partnership, and who the officials of the company were, if it was a corporation. Giving the utmost consideration to this line of reasoning, we submit that it is completely answered by the provisions of Rule 7 (f) of the Rules of Procedure, providing for bills of particulars. (See Appendix).

In final comment upon the Weber case it is certainly proper to observe that the authority of District Judge Sullivan does not transcend the authority of

Judge Brown. Judge Brown's comments on this indictment are more consonant with the Rules of Criminal Procedure than those of Judge Sullivan:

> "It seems to me that under the authority of the Circuit Court of Appeals of this Circuit, and under the statute, all that is necessary to charge the offense in the indictment is contained in the first seven lines of the indictment, and that all after that, to me, is surplusage in the indictment, not necessary to the charging of the offense at all." (R. 111.)

(The court referred to the first seven lines of **Count three,** which in the original document end with the words "and without otherwise being a citizen of the United States.")

It will thus be seen that the trial judge regarded the latter portion of Count three as consisting merely of evidentiary allegations, and it may be that this court will agree with him. Regardless of that fact, however, and whether the latter allegations are surplusage or not, they do make specific and exact the charge against the defendant so that he could not be subject to double jeopardy by reason of indefiniteness in the charge.

This court has twice recently had occasion to announce the rule as to the sufficiency of an indictment.

> United States v. Bickford, 168 F. (2d) 26.
> McCoy v. United States, decision August 24, 1948, not yet reported).

In the first of these decisions this court laid down the following rule,

> "It is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment."

Citing in support of such rule:

> Hagner v. United States, 285 U.S. 427
> Berger v. United States, 295 U.S. 78
> Hopper v. United States, 9 Cir., 142 F. (2d) 181.

In the McCoy case, decided by the entire bench of the Ninth Circuit, the court said:

> "the claim that the indictment is fatally defective rests upon a strained technical analysis of the drafter's rhetoric to the effect that a mere possible meaning of the language used could be," etc.

> "The indictment must be considered as a whole, and the violated statute is cited in it and plainly informs the accused of the law allegedly violated."

All three counts of the indictment here conform to those decisions.

CONTENTION THAT COUNT THREE CHARGES PERJURY

Pages 47-48 of appellant's brief make the claim that the trial court should have applied the rules as to proof of perjury in dealing with the evidence of the government in support of Count Three. We have already set forth and discussed the contents of Count Three, but it may be briefly further referred to. As directed by Rule 7 of the Rules of Criminal

Procedure, it is entitled with the citation of the law charged to have been violated, and reads:

"(Falsely Claiming U. S. Citizenship.)
(8 USCA 746(a) 18)"

So the defendant was fully informed of that.

Now, after alleging what the false representation was, and the time and place, it goes on to say that the appellant was under oath and that he testified. The counsel seized upon these circumstances to base a contention that the government was trying unsuccessfully to plead a count for perjury—in other words to construct a straw man. What the trial court thought of the effort we produce from the transcript:

> "The Court: Whether the Board had authority to administer oaths, or not, is, in my opinion, something that is immaterial, because the statute doesn't require that a representation of citizenship be made under oath before it is unlawful. A representation not made under oath, if untrue, would be as unlawful as one made under oath."
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> ---
>
> "The third count, in my opinion, isn't legally sufficient to charge perjury. If the man was being prosecuted on a charge of perjury, I would have sustained the motion to dismiss on the third count, because in my opinion, the count isn't legally sufficient to charge perjury at all. There may be sufficient in the count, if the statements made under oath by the defendant there before this Board were untrue, were false, it may be that he might be guilty of perjury, but he is not being prosecuted for perjury at all in this case on this indictment.

> It seems to me that under the authority of the Circuit Court of Appeals of this Circuit, and under the statute, all that is necessary to charge the offense in the indictment is contained in the first seven lines of the indictment, and that all after that, to me, is surplusage in the indictment, not necessary to the charging of the offense at all." (R. 110-111.)

Carrying out further the concocting of a straw man, appellant cites

Fotie v. United States, 137 F. (2d) 831, and states (R. 47):

" . . the court **concluded** that perjury was charged" etc. (My italics.) The word "concluded" amounts to a statement that the appellate court in the Fotie case had before it a contention or dispute as to whether the indictment charged perjury or charged something else. No such condition existed. A short quotation will suffice:

> "Two indictments were returned against the appellant in the district court, the first, No. 15,228, charging him with violation of sec. 79 of the Criminal Code, 18 U.S.C.A. sec. 141, and the second, No. 15,239, in three counts **charging him with the crime of perjury under sec. 125 of the Criminal Code, 18 U.S.C.A. 231** . . . .
>
> By stipulation the cases were consolidated for trial before the court without a jury." (Italics supplied.)

The appellate court was not required to decide, and did not decide, any question as to either indictment involving a doubt or dispute as to what crime was char-

ged. It did not hold either indictment insufficient. It treated both indictments as sufficient. It proceeded to discuss in two separate sections of the opinion "The First Indictment" and "The Second Indictment" and its decision deals entirely with the legal sufficiency of the **evidence** (a) to sustain the conviction on the first indictment and (b) to sustain the second. Both bodies of proof were held insufficient.

For the reasons stated all that the Fotie case decided was that in a prosecution for perjury "period" the proof of the crime must consist of either two witnesses or one witness and corroborating circumstances - - - which rule we would have had to comply with if we had charged perjury. Since the only case cited wholly fails to support this contention of appellant, no further discussion seems required.

APPELLANT'S CONTENTIONS INVOLVING SUFFICIENCY OF EVIDENCE, PRESUMPTION OF INNOCENCE, DERIVATIVE CITIZENSHIP, ETC.

The various sections of appellant's brief dealing with the subjects mentioned in the above title really amount to a single contention, which is to the effect that the government did not make a case to go to the jury because of what it did not prove. The problem was succinctly stated by the trial court (R. 139):

"The question is how far is the government

> required to go in its proof to exclude all hypotheses and all conjectures, no matter how extreme they may be."

The government's proof of alienage, as already summarized in the first portion of this brief, showed that appellant in 1936, after a long residence in the United States, petitioned the Immigraton Service to take notice of the fact that he was an alien and to render his American residence lawful (i. e., not subject to deportation, we suppose, since no other reason appears) by making an administrative finding and determination. (R. 102.) It further showed that he again, in 1940, made a declaration, with all the required solemnity prescribed by statute, that he was an alien, and invoked the administrative functions of the government to register him as such. (R. 96-98.) It further showed that the Chief of Information, Henry Colarelli, made search of the master files on April 10, 1947, and found that DePratu was not named in said files. It further showed that the Spokane office of the Immigration Service made search, as of the date of the trial, and that its records showed DePratu to be an unnaturalized alien. (R.103-105). It further showed that DePratu was born in Canada. (R. 97.)

The criticism made of this body of proof is that it was not a prima facie case because the government did not expressly prove that DePratu's father was not a counsular officer in Canada, and did not expressly

disprove that his father entered the country and became naturalized while appellant was under 21. Whether this was not in effect done by the government's case, by a strong inference of fact, we submit by the following analysis:

The existence of derivative citizenship is rebutted by two acts shown to have been done by appellant. (1) In 1936 he petitioned the Department to make a record of his arrival in this country, in order to establish himself as a "lawful permanent resident". (2) in 1940 he filed the Alien Registration instrument.

Both these acts were not mere admissions, they were demands or requests made by appellant that the administrative machinery of the government be put in motion, in the first instance, to have himself listed as an alien lawfully residing in this country; in the second instance, to make a record of his alienage.

IF IT WERE A FACT THAT BEFORE HE CAME OF AGE—ABOUT THE YEAR 1882—HIS FATHER HAD BECOME NATURALIZED AND THEREBY DERIVATIVE CITIZENSHIP HAD ACCRUED TO HIMSELF, HE HAD HAD MORE THAN FIFTY YEARS TO LEARN THAT FACT. AND IF THAT HAD BEEN THE FACT, HE WOULD HAVE APPLIED FOR A CERTIFICATE OF DERIVATIVE CITIZENSHIP, NOT ASKED TO BE REGISTERED AS A NON-CITIZEN.

Thus these two acts stand unexplained—one in 1936, the other in 1940—and the inference there-

from that he had no derivative citizenship was proper for the jury to draw. The claim that the government was under the burden of going back to the preceding generation and establishing that appellant's father was an alien, etc., was dealt with by the trial court as follows:

> "The Court: Well, I can go with you on a part of your argument, Mr. Davidson, I think it is sound. I think that portion of your argument where you maintain that the burden is on the government to prove that this defendant was not a citizen of the United States when he made the representation is sound. I don't have any doubt about it. But here is the question. That is the burden that is on the government as before the jury. This question now is for me to direct a verdict of acquittal, and if there is any evidence at all in the case from which the jury could reasonably conclude that the man was not a citizen, I have no right to direct a verdict of acquittal. If the evidence is in such state that the minds of reasonable men could differ, I have no right to direct a verdict, and there is admitted in evidence this exhibit, Exhibit 5, a writing signed by the defendant in which he said he was born at or near Alexandera, Ontario, Canada. This is his statement. If the jury accepts that statement as true, that establishes his citizenship right there, and establishes that he is not a citizen of the United States. Now, there is a legal presumption that a condition once shown to exist is presumed to exist as long as things of that nature exist. So, he has established himself by his statement as a citizen of a country other than the United States. Now, there is no presumption at all that I know of that one

gains citizenship by reason of lengthy residence in the United States; no such presumption as that that I know of now exsits. In answer to the question, "I am a citizen or subject of," he said, "Uncertain, but last of Canada." So he there again says that his last citizenship status that he knew about was that of a Canadian. He does say, "Uncertain," which means little to my mind, and certainly it doesn't mean that he believes he is a citizen of the United States. He doesn't say there he believes he is a citizen of the United States, but is uncertain about it. He said he was uncertain about his citizenship, the last he knew about it was he was a Canadain. Of course, it is true, and in my opinion, you are correct in your argument that if he came to this country when he was 17 years old, and that is the evidence, and his father or mother came with him, and his father was thereafter naturalized, if he was under 21 years old at the time his father was naturalized, he became a citizen; but if, at the time of his father's naturalization, he was over 21 years of age, he would not became a citizen. But there is no presumption, that I know of that his father came here and was naturalized. There is no presumption that he was naturalized while this man was under the age of 21 years, so as to grant to defendant the benefit of derivative citizenship through the citizenship of his father. **In other words, the question is how far is the government required to go in its proof to exclude all hypotheses and all conjecture, no matter how extreme they may be.** I don't think that the government, in order to make a prima facie case, is required to go to that length, is required to go to the length of showing whether the father of this defendant himself became a

> naturalized citizen of the United States, and further to show that if the father did become naturalized, he did not become naturalized during the minority of this defendant and while this defendant was residing in the United States. To me that seems to be requiring or placing a burden of proof upon the government that the government couldn't possibly be expected to assume, and particularly in view of the testimony of the inspector here that was given and stands uncontradicted that they may or may not have a record of a minor child whose father was admitted to naturalization, depending upon the record his father furnishes at the time of his admission to citizenship." (Italics supplied.) (R. 137-140.)

The same reasoning applies with equal force to the hypothesis that appellant's parents were American citizens residing in Canada. He had had fifty years to learn that fact, if it existed, and he did not take the witness stand.

Likewise, his Canadian birth resulted, of course, in Canadian citizenship. There exists no presumption that by residence in the United States he became naturalized.

United States ex rel. Barilla v. Uhl, 27 F. Supp. 747:

> "True, the burden is upon the government of proving alienage (United States ex rel, Bilokumsky v. Tod, 263 U.S. 149, 44 S.Ct. 54, 68 L.Ed. 221), but I think the burden has been met by the government, because the relator here was born in Italy and was an alien when he entered the country and on several of his re-entries to this country he was still an alien

> and this status is presumed to have continued until the contrary is established. Hauenstein v. Lynham, 100 U.S. 483, 25 L.Ed. 628.

At this point it is proper to juxtapose the language of the Supreme Court which pretty well settles all questions of presumptions and inferences, including particularly the extent of the presumption of innocence, which appellant invokes. Dunlop v. United States, 165 U.S. 486, 502:

> "The position of the defendant in this connection is that the presumption of the defendant's innocence in a criminal case is stronger than any presumption, except the presumption of the defendant's sanity, and the presumption of knowledge of the law, and that he was entitled to a direct charge that the presumption of the defendant's innocence was stronger than the presumption that the messengers, who deposited these papers in their proper boxes, took them from the mails. If it were broadly true that the presumption of innocence overrides every other presumption, except those of sanity and knowledge of the law, it would be impossible to convict in any case upon circumstantial evidence, since the gist of such evidence is that certain facts may be inferred or presumed from proof of other facts. Thus, if property recently stolen be found in the possession of a certain person, it may be presumed that he stole it, and such presumption is sufficient to authorize the jury to convict, notwithstanding the presumption of his innocence. So, if a person be stabbed to death, and another, who was last seen in his company, were arrested near the spot with a bloody dagger in his possession, it would raise,

in the the absence of explanatory evidence, a presumption of fact that he had killed him. So, if it were shown that the shoes of an accused person were of peculiar size or shape, and footmarks were found in the mud or snow of corresponding size or shape, it would raise a presumption, more or less strong according to the circumstances, that those marks had been made by the feet of the accused person. It is true that it is stated in some of the authorities that where there are conflicting presumptions, the presumption of innocence will prevail against the presumption of the continuance of life, the presumption of the continuance of things generally, the presumption of marriage and the presumption of chastity. But this is said with reference to a class of presumptions which prevail independently of proof to rebut the presumption of innocence, or what may be termed abstract presumptions. Thus, in prosecutions for seduction, or for enticing an unmarried female to a house of ill-fame, it is necessary to aver and prove affirmatively the chastity of the female, notwithstanding the general presumption in favor of her chastity, since this general presumption is overridden by the presumption of the innocence of the defendant. People v. Roderigas, 49 California, 9; Commonwealth v. Whittaker, 131 Mass. 224; West v. State, 1 Wisconsin, 209; Zabriskie v. State, 43 N.J. Law, 640; 1 Greenl. Ev. § 35. This rule, however, is confined to cases where proof of the facts raising the presumption has no tendency to establish the guilt of the defendant, and has no application where such proof constitutes a link in the chain of evidence against him.

In such cases as the one under consideration, it is not so much a question of com-

> parative presumptions, one against the other, as one of the weight of evidence to prove a certain fact, namely, that these papers were taken from the mails. It was a question for the jury to say whether the facts proven in this connection satisfied them beyond a reasonable doubt, and notwithstanding the presumption of innocence, that these papers were taken from the mails; and the abstract instruction requested would only have tended to confuse them, since, if literally followed, it would have compelled a verdict of acquittal."

The argument concerning derivative citizenship can very well be disposed of on the following quite reasonable basis: Derivative citizenship would have to be acquired before appellant came of age, which would be in the year 1899, since he was born in 1878. It could not happen at any later date. However, both in 1936 and 1940 he declared himself to be an alien. The jury would have the right to accept the evidence that he was an alien both in 1936 and 1940, or in either of those years. Such being the fact, derivative citizenship would be impossible because of the age factor. Concerning the alleged possibility of appellant having been the child of U. S. citizens living in Canada, the same reasoning would apply with equal or greater force.

The jury would then properly come to the point of considering whether appellant, between 1936-1940 and the year 1946, when the representations were made (January, June and September), became naturalized by the statutory procedure. They would have

to regard the uncontradicted showing made by the Colarelli certificate and the Nooney testimony, i.e., by the records of the Spokane office of the Immigration Service as well as the master records of the entire national service, that appellant was still in the year 1947 a non-naturalized resident of this country, and therefore that he could not have been a citizen at any time in the year 1946.

To ask the court to take the case from the jury in the face of such a record, as counsel did by their motion for acquittal, was merely to invite the court to ignore the facts in evidence.

NO BREACH OF THE RULE THAT ADMISSIONS REQUIRE CORROBORATION

In complaining of the rulings of the trial court appellant has failed to observe the distinction between admissions made before the time of the offense charged, on the one hand, and admissions in the nature of confessions which are made after such time. The statements of appellant which he asserts to be admissions consist of two written declarations hereinbefore discussed, viz., his petition to be 'regularized' as a resident alien and his registration as an alien before the Immigration Service. These two declarations were, as herein noted, made in 1936 and 1940 respectively—the one eight years and the other six years before the time of the crime charged. Such

declarations are not within the rule that corroboration is required.

Warszower v. United States, 312 U.S. 342, 347

"The rule requiring corroborations of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist. Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weaknesses of confessions or admissions after the fact. Cases in the circuits are cited by petitioner to the contrary. In Gulotta v. United States, the decision turned on the similarity of confessions and admissions rather than upon any differences between admissions before and after the fact. In Duncan v. United States and in Gordnier v. United States the conclusion was reached without any comment upon this difference. Our consideration of the effect of admissions prior to the crime leads us to the other conclusion.

The law requires that a jury be convinced beyond a reasonable doubt of the defendant's guilt. An uncorroborated confession or evidence of perjury, given by one witness only, does not as a matter of law establish beyond a reasonable doubt the commission of a crime, but these are exceptions to the normal requirement that disputed questions of fact are to be submitted to the jury under appropriate instructions. In this case the earlier statements of birth and therefore necessarily of residence outside of the United States, if believed by the jury, prove the falsity of the statements to the contrary in the application. Where the crime

> charged is a false statement and where it finds its only proof in admissions to the contrary prior to the act set out in the indictment, it may be unlikely that a jury will conclude that the falsity of the later statement is proven beyond a reasonable doubt, but such evidence justifies submission of the question to them.
>
> In this present case there was other evidence of the falsity of the disputed statements in the application."

This court will have observed that appellant's brief relies on

Duncan v. United States, 68 F. (2d) 136, and
Gulotta v. United States, 113 F. (2d) 683,

and will now observe from the foregoing quotation that they are both specifically overruled insofar as they hold (if they do hold) that admissions prior to the time of the offense charged require corroboration.

The third and last case relied on by appellant on the point under discussion is

United States v. Isaacson, 59 F. (2d) 966,

which has to do with the corroboration required of the prosecution in a perjury case, and contains no discussion whatever of the doctrine concerning extra-judicial admissions.

Accordingly this point is unsupported by any authority whatever, and requires no further discussion **on the assumption of appellant that the declarations in question were not corroborated.**

But they were corroborated. The declaraitons proved he was an alien in 1936 and 1940. The Immigration Service records proved he was an alien in 1947 and 1948. This was all part of a continuing status over a 12-year period. So the record does not support appellant even if he had any authority for the rule asserted.

FAILURE TO CHARGE ON CIRCUMSTANTIAL EVIDENCE

In appellant's brief, pp. 41, 42, are discussed his Specifications 17, 20 and 21. As a basis for the contention under this head counsel says:

> "The evidence as to defendant's citizenship, or lack of the same, is entirely circumstantial."

What the trial court thought is shown on R. 183:

> "We have direct and positive evidence, oral and in writing, that the man said he was a citizen of the United States. We have direct and positive evidence, if believed by the jury, that the man is not a citizen of the United States. Neither one of these things have been proven by circumstantial evidence or indirect evidence."

The same counsel made the same contention which he makes here, in

> McCoy v. United States, 9th C.C.A., Aug. 24, 1948, (not yet reported).

It is believed that just about everything this court's opinion in the McCoy case contains on that subject

is pertinent, but we do not wish to quote it all. In part it must be:

> "Measured by the above rule there is evidence of both kinds in the case, each of which, in all probability, had considerable weight with the jury. However, even with the aid of such a concise statement, it is not always easy to lay one item of evidence on one side of the distinguishing line and another item on the other side of the line. Much evidence, which, with its recital, would be classed as direct evidence, upon closer observation turns out to be circumstantial in character. Events occur so often in pattern that we accept them as direct evidence of a fact proved, whereas they are only facts which habitually accompany the fact we deem proved. Any rule for the special treatment of evidence upon the basis of its character, direct or circumstantial, is bound to be difficult of correct application. And too, any instruction to a jury directing a different treatment for circumstantial evidence than is to be accorded direct evidence will, if heeded at all, tend to confusion and incite in the juror's mind the too prevalent and persistent illusion that circumstantial evidence is inferior to direct evidence. The giving of any such instruction is very apt to be regarded as in some degree judicially confirming the not uncommon belief that a conviction by the aid of circumstances is highly unreliable and unconscionable. The books are full of judicial discord through attempts to distinguish between direct and circumstantial evidence in jury instructions."

We insist that the trial court rightly stated that there was no circumstantial evidence in the case.

There could have been evidence that the defendant had voted at American elections without challenge, which would have been a circumstance consistent with citizenship. He could have testified that he had had a homestead patent issued to him by the United States Land Office, which would have been consistent with citizenship. He could have testified that he had served in the armed services of the United States, which would have been consistent with citizenship. These would have been circumstantial. However, no such evidence was offered, either by defendant himself as a witness, or therwise. On the other hand the government did not offer any such circumstances as a part if its case. It did not offer proof that defendant had attempted to vote in Montana elections and been successfully challenged. It did not offer proof that he had voted in a Canadian election, or exercised some other right consistent with Canadian citizenship. These are illustrative instances of the kind of evidence that might properly be called circumstantial in this kind of a case. There was none of that kind. For that reason alone the court was justified in declining to run the risk of confusing and misleading the jury by charging them on how to deal with a kind of evidence that did not exist in the case at all.

In the McCoy opinion this court further noted that the trial court fully protected the defendant in the charge which it did give:

> "When the charge to the jury is read as an integrated whole, as all instructions should be read, it is seen that the court in simple, understandable language defined the essential rights of both government and accused. It understood and realized that the duty of the jury was to listen to everything the court permitted to be presented to it and under certain fundamental rules to apply it to the issue of guilt or innocence. Together with defining the fundamental rules for the consideration of the evidence, the court told the jury: 'When two conclusions may be reasonably drawn from the evidence, the one of guilt and the other of innocence, the jury should reject the one of guilt and accept the one of innocence, and in that event should find the defendant not guilty. That is where two conclusions can be drawn as reasonably one way as the other, one pointing to the guilt and one to the innocence, you, of course, must indulge the presumption of innocence and draw the conclusion of innocence.' "

In its charge in the instant case the trial court charged (R. 219):

> "The guilt of an accused is not to be inferred because the facts proved are consistent with his guilt, but on the contrary before there can be a verdict of guilty, you must believe beyond a reasonable doubt that the facts proved are inconsistent with his innocence, and if two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, you should adopt the former."

And he also charged with respect to intent (R. 224):

> " * * * both of these elements, namely, act and intent, must not only exist, but must

> be proven in this case to the satisfaction of your minds beyond a reasonable doubt, else you must find the defendant not guilty, and the intent with which an act is done may be inferred from the attendant circumstances, but, when the circumstances are such as to furnish the basis for an inference of some intent other than that necessary to constitute the particular crime charge, a verdict of guilty of the crime charged cannot be sustained."

Lastly, this court quoted with approval:

> Gurera v. United States, 40 F. (2d) 338, and Affronti v United States, 145 F. (2d) 3,

in their application to the record which existed in the McCoy case and which exists here, viz.,. that the government's case is "unexplained and uncontradicted."

> "In Gurera v. United States, 40 Fed. 2d 338, 340 (Cir. 8), it is said: 'There are cases where such form of instruction is proper but those are cases where the essential facts are proven only by circumstantial evidence, and where such evidence, taken to be true, is as consistent with innocence as with guilt. That is not the situation here. The evidence here shows that, if the jury should believe the facts as detailed by the government, in fact, it may be said if they believe those facts which are undisputed, then there would be no room for more than one construction thereof because they are not consistent with innocence.' In Affronti v. United States ,145 Fed. 2d 3, 9 (Cir. 8), it is said:'Some of the evidence in this case was circumstantial, such as the evidence of flight. Some was direct and positive. The court might properly have told the jury that some of the evidence was circumstantial, and have includ-

> ed in its instructions the circumstantial evidence rule. Since the evidence of the government was unexplained and uncontradicted, and if believed, was inconsistent with the innocence of the defendant, we think that the failure of the court to include the circumstantial evidence rule in its instructions was not error. Gurera v. United States, 8 Cir., 40 F, 2d 338, 340; Corbett v. United States, 8 Cir., 89 F. 2d 124, 128; Stryker v. United States, 10 Cir., 95 F. 2d 601, 604.' See also Bedell v. United States, 78 Fed. 2d 358, 368 (Cir. 8)."

Not only did DePratu himself not testify, but he offered no evidence whatever except some corporate records which contradicted nothing and explained nothing, and some applications for beer licenses which contain no questions or answers concerning citizenship whatever. (R. 151-159.)

THERE WAS NO SOLE RELIANCE ON CANADIAN BIRTH TO PROVE NON-CITIZENSHIP

Because of the emphasis which the trial court placed on the Canadian birth of appellant, and the lack of any presumption that he had been naturalized, there is an effort to show that the government's case is as weak as that in

Colt v. United States, 158 F. (2d) 641,

in which the government merely proved birth in Romania and offered no evidence of non-naturalization. The distinction is easily apparent.

> "The trouble here is that there are no circumstances which fairly indicate that Colt

has never been naturalized."

"The proof does not show that in 1942 he had not become a citizen."

"Indeed the transcript shows that the district attorney stated before closing his case that he had a witness from the Bureau of Naturalization by whom he could prove that Colt had not been naturalized, but did not think it necessary to use him."

In the present case we covered that ground twice, once by the Colarelli certificate, which includes the entire United States (R. 100), and again by witness Nooney, whose records covered the State of Montana, in which DePratu had lived for many years immediately and continuously before the year 1946, (R. 103-5, also defense opening statement, R. 141). And we covered it twice more by the written declarations of DePratu in 1936 and 1940 that he was an alien.

It is contended in appellant's brief, by the quoted remarks of the trial court, that if the government had rested merely on proof of Canadian birth, there might have been a ruling by the trial court contrary to the Colt case. The emphasis which the trial court placed on the Canadian birth was occasioned—when the context of the entire colloquy between court and counsel is read—by a discussion back and forth as to what meaning should be placed on the words, "I am a subject or citizen of what country: Uncertain, but last of Canada." The charge to the jury did not rest the

issue on Canadian birth alone, but the court said: (R. 239.)

> "So, if his statement were that he was born in Canada, **and the other evidence in this case is true and believed by you,** that establishes that he is a Canadian citizen and thus an alien as far as citizenship in the United States is concerned." (Emphasis supplied.)

Immediately following the Colt case in the report is a companion case,

Campa v. United States, 158 F. (2d) 643,

in which the court (CCA 5th Circuit) said:

> "In Colt v. United States, 158 F. 2d 641, this court has had occasion to discuss fully the nature and quantum of proof required to support a conviction of the offense charged here. We reversed the judgment there for the complete absence of proof as to whether defendant had been naturalized. Here, while the proof would have been more complete if the government had followed up the declaration of intention with evidence that it had been allowed to lapse and no certificate of naturalization had ever issued to defendant, the evidence was yet ample to support the verdict that he was an alien and that he had not been naturalized."

In the present case our proof went far beyond that in the Campa case, which was held to be ample to support a verdict of guilty.

EXCLUDED EVIDENCE AND GIVEN AND REFUSED CHARGE ON "MOTIVE" AND "INTENT".

Complaint is made of the ruling of the trial court

excluding testimony by the attorney for the Montana Liquor Control Board that the application of De Pratu for a liquor license was "deemed" to be the application of his corporation, and also of the exclusion of some corporate minutes which it is claimed show that appellant was intending to apply "for the corporation and not for himself." In the same connection complaint is made of the court's refusal to give a charge on **motive** (not intent) and of the court's charge as to the knowledge which appellant had that the coprorration was ineligible to acquire a liquor license. (Appellant's Brief, p. 49 et seq.)

Counsel summarizes his contention as follows:

> "The defendant suffered prejudice in that the defense that the application was **not intended to represent anything as to DePratu's citizenship** was virtually withdrawn from the jury." (Emphasis supplied. Brief p. 54.)

To begin with, the trial court did admit some of the corporate proceedings as shown in its minutes, and did admit the beer license application, upon the urging of defense counsel that these matters bore upon the issue of intent; it went further in this direction than appeared necessary. (R. 146-158, 164-168, 172-174.) The portions of corporate minutes excluded were either hearsay and self-serving, or were after the fact, or were wholly foreign to the subject, or all three.

The beer license was admitted (R. 156-158). It

states nothing as to citizenship and was viewed by the trial court as tending to prove nothing as to intent, but he let it in with the remark:

> "I think the Court should, where that question (intent) is involved, as it is here, should be somewhat liberal in permitting evidence on that question to go to the jury. After all, this is the defendant's side of the story, and while I say it may not impress me, it may impress the jury, I don't know. He should have the opportunity to tell it to them. So, the objection will be overruled and it will be admitted in evidence simply and purely as to the question of the intent of the defendant." (R. 156.)

It should further be observed that all the excluded matter on this question of "for whom were the licenses applied for?" could have established nothing more than was already undisputedly in evidence in the government's case; viz., that DePratu **could not lawfully get a license for the corporation** and therefore applied for one for himself. It would have simply proved over again that the government not merely admitted, but asserted; viz., that the reason he applied for a license personal to himself was because he could not get one for the corporation—the Liquor Board just would not issue one to the corporation,—which he well knew because his attorney had learned that and had so advised. What possible probative tendency would this have either to show an innocent intent or disprove a guilty intent, in making the false claim of citizenship? It would have been just as

false, and just as much a violation of the statute, no matter for whom the license was applied.

Before going further, it should be observed that defense counsel stated to the jury something which he never offered to prove: (R. 141.)

> "We expect to show that Mr. DePratu **did not read these printed documents,** but filed them and that he had no intention to make any false representation as to his citizenship, and that, therefore, no offense is shown under the charges in the indictment." (Emphasis supplied.)

Of course the defense never offered or tried to prove that appellant did not read the applications (which, if offered, might have been pertinent to the issue of 'knowingly' at least) and the reason doubtless is because they were determined not to put appellant on the witness stand. Whatever the reason, they stated to the court and jury that they would prove this—that DePratu never read the applications—and either did not intend to prove it at all, or changed their minds. By not offering any such evidence they left the documents speaking for themselves—signed by the appellant, and of course, **knowingly signed.**

(While we are on the subject of the defense opening statement, we ask the court to read it through (R. 140-141)—it is less than two pages—and to observe that no promise is made whatever of any defense to the **third count** involving his testimony before the Immi-

gration officers that he was a citizen of the United States; nor any assertion that he had any kind of citizenship at any time. He did undertake to make a defense to the indictment, and the only fragment of a defense which he proposed to make dealt with the existence of intent on the first two counts.)

So, taking into consideration what the defense promised to prove and did not, and what they did not even promise to prove, in what position is the appellant's complaint that the excluded evidence contained anything that would have rebutted the government's case? Would he think it was not false to lie in a corporate application merely because the applicant was not a natural person? Would he claim to be more innocent in making such a false statement because he had hired a lawyer expressly to advise him that the corporation as an applicant would be turned down by the Liquor Board? The only fact which is at all clear in this struggle to fill the record with corporation minutes is that the defense tried to inject into the case an issue which was obviously irrelevant— whether DePratu wanted the license to run a saloon under the corporation entity, or to run one as an individual. Either way he would be guilty if he falsified the application as charged, and this was never denied, rebutted or questioned.

Again, what difference would it make or did it make if after getting the license, he assigned it to the cor-

poration? The crime of making the false representation was already complete before the license was issued, and before it could be assigned. It is somewhat amusing to consider the argument that DePratu did not have to make the application himself because he had in his corporation two incorporators who were citizens, and so he could have had one of them make it. Of course he could, but he chose not to. He was out to get a liquor license one way or another, and he employed the subterfuge of making it in his own name personally, so as to comply (?) with the state law. The license was actually for the 'Stockman's Club' and its actual use was the same from start to finish. Wherein does this evasion of the state law furnish a defense that defendant did not know he was making a false claim of citizenship? It only tends to show that making such a false claim was a trifling matter to him. The trial court took the view that it was not a trifling matter:

> "These papers are not idle forms, and if an individual makes an application to the state in which these questions are asked him and if there is a fact falsified, because they are printed and he did not read it, it will not excuse him." (R. 152.)

This quotation also shows that the trial court expected, because of the counsel's opening statement, that DePratu would take the stand and testify that he did not read the applications. If he had done so, some kind of an argument might have been made that the

excluded matters were corroborating circumstances; but there was nothing to corroborate.

Again, how can appellant complain that it was not shown that the Liquor Board "deemed" the application to be corporate or personal? We don't know what the witness would have said, but if the Board had "deemed" it to be corporate and acted favorable upon it, it would have violated the Montana Liquor Control Act. (Appendix.) And the court would then have entertained the spectacle of the attorney for the Liquor Board testifying that the Board had ignored his advise and accepted an illegal subterfuge. Of course, the whole thing was inadmissible because it was an attempted lay interpretation of a document which was before the court for the court's own interpretation.

Now we come to "motive". Appellant says:

> "Therefore, the Court by refusing to give offered instruction No. 16, in which it is stated that the absence of motive might be considered by the jury, also prejudiced the defendant." (Brief, 54.)

In support of this contention counsel quotes from 23 C.J.S. sec. 1198 **only the title** of the paragraph. The paragraph in its text is as follows:

> "Where there is evidence as to motive, it is proper to instruct that the absence of a probable motive is a circumstance in favor of accused, or at least a circumstance to be considered in weighing the evidence of guilt, particularly where, by an instruction for the prose-

> cution, the attention of the jury has been directed to accused's motive; but, where there is evidence sufficient to indicate that there was a motive, the court may refuse to instruct that lack of motive is a circumstance favoring accused; and it is not improper to instruct that, where a motive is shown, it is more likely that accused committed the crime than a man who had no motive. The court need not charge that there is no evidence of motive. If the offense is made out clearly, it is not necessary to prove motive, and the court properly may so charge, or may refuse a request to charge to the contrary. Where intent has been shown by direct or circumstantial evidence, it is not material that the jury be instructed as to motive."

The evidence both of motive and intent was actually supplied by the defense in Exhibit 15 (R. 167.):

> "The said L. P. DePratu, thereupon offered to obtain slot machine licenses in accordance with the laws of the State of Montana and beer and liquor licenses for said establishment in accordance with the laws of the State of Montana and to pay for the same personally, providing he would be secured at some future date for said expenditure."

Apparently the two Lundby sisters, who were co-incorporators, were not in a position to advance the license fees and other expense incurred in forming this "non-profit club" which was to reimburse appellant for his outlay. He kept everything under his own personal control, and it is absurd to contend that he did so through mere indifference or inattention. The Lund-

bys were what we sometimes call dummy directors. In fact the argument of counsel seems to be that he could have used one of his dummies to apply for the licenses. Doubtless he would have done so if he had forseen the consequences which have taken place in this action. It is in the record that he had one Sherman Smith, a competent lawyer, advising him in the formation of this concern. Sherman Smith (not to be confused with Paul Smith, attorney for the Liquor Board) was not called as a witness, and it is obvious that if he had been called he would hardly have testified that he advised DePratu to make a false oath and claim of citizenship, but rather have insisted that that claim was solely the act and responsibility of DePratu himself.

In this connection appellant complains of the interruption of his argument to the jury, as quoted on p. 62 (appendix) of the appellant's brief:

> "Mr. Acher: . . . Was considered by Mr. Smith as an application on behalf of the Stockman's Club. (interrupted)
>
> "The Court: Confine yourself to the evidence. No such evidence was permitted in the case. Objections were constantly sustained to that line of testimony." etc.

That the trial court here spoke by the record appears from R. 145:

> "Q. (By Mr. Acher to witness Paul Smith, attorney for the Liquor Board) In your consideration of this application was it deemed an application of DePratu individually or an

> application of the Stockman's Club?
>
> (Objection)
>
> "The Court: Yes, sustained. It is an invasion of the province of the jury. It is an exhibit in evidence, and it is for the jury to say whether it is an application made by DePratu or the Stockman's Club. It is a question for them to decide, not for a witness on the witness stand."

We cannot better summarize this entire head of discussion than by pointing to the extraordinary contradiction involved in the attempted defense. In one breath the defense claimed that DePratu, through inattention or carelessness, thought he was making a corporate application, and in the next breath proved that it was forcibly brought to his attention that the corporation could not be eligible. It is more than confusing. It is self-destructive of the attempted defense.

VARIOUS CRITICISM OF INSTRUCTIONS

Under this head we deal briefly with the only remaining specifications of error not already covered.

1. There was no requirement of or duty upon the trial court to instruct the jury on the subject of derivative citizenship for the reason that there was no evidence admitted or offered which tended in any way to show that such citizenship was acquired by appellant. The court's charge need not deal with a hypothesis purely imaginary.

2. As to the court's definitions of "feloniously", "knowingly and wilfully" and "falsely" it seems to

the writer that not only were these words correctly defined by the court, but also that the charge as a whole made it impossible for the jury to be misled, to the appellant's prejudice or otherwise, as to the elements of the offense charged. The point was properly summed up by the court's charge as follows: (R. 237.)

> "The intent that is material here is whether or not, as I have told you, he intended to deceive the State Liquor Control Board into believing he was a citizen and thus issue a liquor license to him."

None of the authorities quoted give ground for the conclusion that any of the criticized instructions were erroneous.

The judgment should be affirmed.

Respectfully submitted:

JOHN B. TANSIL,
United States Attorney;

HARLOW PEASE,
Assistant U. S. Attorney;

EMMETT C. ANGLAND,
Assistant U. S. Attorney.

APPENDIX

Title 8 U.S.C. sec. 746.

(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—

(18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized to citizenship, or without otherwise being a citizen of the United States.

Title 18 U.S.C sec. 141. (repealed) Whoever shall knowingly use any certificate of naturalization heretofore or which hereafter may be granted by any court, which has been or may be procured through fraud or by false evidence, or which has been or may hereafter be issued by the clerk or any other officer of the court without any appearance and hearing of the applicant in court and without lawful authority; or **whoever, for any fradulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship, shall be fined** not more than $1,000, or imprisoned not more than two years, or both. (Italics ours).

Rules of Criminal Procedure.

Rule 7 (c) Nature and Contents. The indictment or the information shall be a plain, concise and

definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) Surplusage. The Court on motion of the defendant may strike surplusage from the indictment or information.

(f) Bill of Particulars. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Chapter 84, LI. Montana 1937:

Sec. 3. The Montana Liquor Control Board is hereby empowered, authorized and directed to issue licenses to qualified applicants as herein provided * *

Sec. 5. Prior to the issuance of a license as herein provided, the applicant shall file with the Montana liquor control board an application in writing, signed by the applicant, and containing such information and statements relative to the applicant and the premises where the liquor is to be sold, as may be required by the Montana liquor control board. The application shall be verified by the affidavit of the person making the same before a person authorized to administer oaths. If any false statement is made in any part of said application, the applicant, or applicants, shall be deemed guilty of misdemeanor and upon conviction thereof the license, if issued, shall be revoked and the applicant, or applicants, subjected to the penalties provided by law.

Sec. 10. **No license shall be issued by the board to:** * * *

6. **A person who is not a citizen of the United States** and who has not been a citizen of the State of Montana for at least five (5) years and who has not been a citizen of the county in which the license is to be issued for at least one (1) year.

No. 11843

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,

Appellee.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeals From the District Court of the United States for the Southern District of California

Central Division

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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INDEX TO EXHIBITS

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant and Cross-Appellee United States of America:

JAMES M. CARTER

United States Attorney

RONALD WALKER

ARLINE MARTIN

Assistants U. S. Attorney

600 U. S. Post Office and Court House Building

Los Angeles 12, Calif.

For Appellee and Cross-Appellant Pacific Electric Railway Company:

FRANK KARR

C. W. CORNELL

E. D. YEOMANS

670 Pacific Electric Building

Los Angeles 14, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

In the District Court of the United States in and for the Southern District of California
Central Division

No. 4256-PH

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION

Pacific Electric Railway Company brings this its petition against the United States of America pursuant to the provisions of Section 41, Paragraph 20, of Title 28 of the United States Code, and for a cause of action alleged as follows:

I.

Plaintiff is a corporation duly incorporated and consolidated under the Laws of the State of California, operating a system of railway in the Counties of Los Angeles, Orange, San Bernardino and Riverside, California, and is now and was during all of the times hereinafter mentioned engaged in the operation thereof as a common carrier of property in both intrastate and interstate commerce. Plaintiff maintains its principal office in the City of Los Angeles, County of Los Angeles, State of California, in the above referred to District. [2]

II.

At certain times in 1943, as hereinafter more particularly stated, plaintiff in participation with other common carriers by railroad, at the request of the defendant by and through its Maritime Commission or through other authorized departments or agents, transported for and on behalf of defendant, from various points in the United States, shipments to Los Angeles, California. All of the said shipments were made upon through Government bills of lading according to a certain form prescribed and furnished by defendant. Plaintiff, as final and delivering carrier, made delivery of the shipments in accordance with the bills of lading.

Annexed to this petition and made a part hereof is a statement marked Exhibit "A" showing the details of the service performed as aforesaid, including the kind of property transported, the points between which transportation was performed, the routes of movement, the number of plaintiff's bills and dates thereof, the number of Government bills of lading and dates thereof, identity of cars in which transportation was performed, dates of delivery, weights of carload shipments transported, applicable tariff rate, amounts billed, amounts paid, balance claimed, consignor and consignee, and reference to the lawfully published and effective tariffs containing the freight rate or rates applicable to the transportation of the shipments involved and conditions in connection therewith, said tariffs being shown by their abbreviations, which are well known among carriers and shippers.

III.

Each of the carriers participating in said transportation was, at all times herein mentioned, a party to and

participated in the tariff or tariffs specifying the applicable rate or rates for said transportation services. Said tariffs and the rates specified therein were duly published and filed with the Interstate Commerce [3] Commission as required by the provisions of Section 6 of Part I of the Interstate Commerce Act and was in legal effect at the time when the shipments were made. Plaintiff based the amounts of the charges billed defendant for said transportation services on the duly published and filed and legally effective applicable rate or rates specified in said applicable tariff or tariffs and shown as aforesaid in Exhibit "A", attached hereto.

IV.

Thereafter, and upon the completion and delivery of each such shipment plaintiff, being the final and delivering carrier, from time to time submitted its bills to defendant for the total amount of Nineteen Thousand Nine Hundred Twenty-Six and 65/100 Dollars, ($19,926.65) for the service of transportation so rendered as heretofore described, based upon the lawful and applicable rate or rates as aforesaid, and demanded payment of said amount for said transportation services performed by plaintiff and other participating carriers. Defendant refused to make payment in the sum of Nineteen Thousand Nine Hundred Twenty-Six and 65/100 Dollars ($19,926.65) for such transportation services, and paid to plaintiff the sum of Ten Thousand Two Hundred Seventy-Two and 17/100 Dollars ($10,272.17). The sum so paid was accepted by plaintiff under protest and as part pay-

ment only. Plaintiff subsequently rendered its bills to defendant for the unpaid balance of said transportation charges in the total amount of Eight Thousand Nine Hundred Forty-Seven and 73/100 Dollars ($8,947.73), credit having been given defendant for the sum of Seven Hundred Six and 75/100 Dollars ($706.75) overpaid on a prior bill, but defendant refused and still refuses to pay said amount or any part thereof.

V.

All carriers by railroad owning and operating or operating lines of railroad constructed with the aid of grants of land received from the United States, either directly or through a predecessor or predecessors in interest, participating [4] in the transportation of the shipments herein described, and each of them, and all carriers by railroad owning and operating or operating lines of railroad constructed with the aid of grants of land received from the United States, either directly or through a predecessor or predecessors in interest, parties to and participating in any land grant route or routes with which the route or routes of movement of the said shipments herein described were equalized under agreement with the United States from the standpoint of net charges to the United States for transportation service, and each of them, had, prior to and at the time of said shipments, filed with the Secretary of the Interior of the United States, in the form and manner prescribed by him, releases of all of their, and its, claims against the United States to lands, interests in lands, compensation, or reimbursement on account of

lands and interest in lands which have been granted, claimed to have been granted, or which it was claimed should have been granted to any such carrier or predecessor in interest under any grant to such carrier or predecessor in interest, in full and complete compliance with the provisions and requirements of paragraph (b) of Section 321 of Part II, Title III, of the Transportation Act of 1940 (54 Stat. L. 954). Each of such releases so filed was approved by the Secretary of the Interior prior to the shipments in question and the performance of the transportation service hereinbefore set forth.

VI.

By reason of the matters and things herein stated, plaintiff is justly entitled to the sum of Eight Thousand Nine Hundred Forty-Seven and 73/100 Dollars ($8,947.73) from the United States of America on account of the shipments hereinbefore described, after allowing all charges, credits and offsets. No part thereof has been paid and no assignment or transfer of said [5] claim or any part thereof or interest therein has been made.

Wherefore, plaintiff prays judgment in its favor against the United States of America in the sum of Eight Thousand Nine Hundred Forty-Seven and 73/100 ($8,947.73).

FRANK KARR
C. W. CORNELL
E. D. YEOMANS
Attorneys for Plaintiff

[Verified.] [6]

EXHIBIT "A"

Commodity: Machinery

Consignor: Foster Wheeler Corporation

Consignee: California Shipbuilding Corporation—
United States Maritime Commission

From Carteret, New Jersey to Los Angeles Harbor, California via The Central Railroad Company of New Jersey, Reading Company, Western Maryland Railway Company, The Baltimore and Ohio Railroad Company, Chicago, Rock Island and Pacific Railway Company, Southern Pacific Railroad Company and Pacific Electric Railway Company.

	Number	Date
Government B/L	MC-218872	1-26-43
Carriers Bills:		
Original Bill	F-18436-3	3-43
Supplemental Bill	R-18436-3	3-44

Car Initial & No.		Delivered On Or About	Wgt.	Tariff Rate	Amount Billed	Paid	Balance Claimed
L&N	57464	2-19-43	48380	2.26	$1,093.39	$717.99	$375.40

Tariff Authority: T. C. F. B. 1-W, Item 3960.

General Accounting Office Certificate No. T-211357
Claim No. 727133, 11-1-43

Date payment received: November 20, 1943 [7]

Commodity: Line Shaftings

Consignor: Shartle Bros. Machine Company

Consignee: California Shipbuilding Corporation—
United States Maritime Commission

From Middletown, Ohio to Los Angeles, California via The New York Central Railroad Company, Minneapolis & St. Louis Railroad Corporation, Chicago, Rock Island and Pacific Railway Company, Southern Pacific Railroad Company and Pacific Electric Railway Company.

	Car Initial & No.	Number	Date
Government B/L	PLE 42097	MC-311664	10-19-43
	NYC 711333	MC-311665	10-23-43

Carriers Bills:

Original Bill	F-26475-1	1-44
Supplemental Bill	R-26475-1	9-44

Car Initial & No.		Delivered On Or About	Wgt.	Tariff Rate	Amount Billed	Paid	Balance Claimed
PLE	42097	11-5-43	87000	1.96	$1,705.20		
NYC	711333	11-9-43	79980	1.96	1,567.61		
					$3,272.81	$212.70	
NOTE: Credit of $706.75 given defendant for overpayment on prior bill						706.75	$2,353.36

Tariff Authority: T. C. F. B. 1-X, Item 3960

Date of payment: July 17, 1944

Credit of $706.75 shown above, was on Government B/L MC-27046, MC-27036 and MC-34905, Carriers Bill F-10540-1, 1-42, G. A. O. File T-2137345 5-42 G. F. A. [8]

Commodity: Steel Plates

Consignor: Republic Steel Corporation

Consignee: California Shipbuilding Corporation—United States Maritime Commission.

From Alabama City, Alabama to Los Angeles Harbor, California, via The Alabama Great Southern Railroad Company, New Orleans & North Eastern Railroad Company, Mississippi Central Railroad Company, Louisiana & Arkansas Railway Company, Southern Pacific Railroad Company and Pacific Electric Railway Company.

	Car Initial & No.	Number	Date
Government B/L	IC 95932	MC-411214	5-16-43
	PRR 750831	MC-411214	5-16-43
	PRR 346916	MC-411234	5-22-43
	Sou 176796	MC-411234	5-22-43
	PRR 344421	MC-411234	5-22-43
	NYC 706861	MC-411234	5-22-43
	Sou 287197	MC-411234	5-22-43
	SAL 96976	MC-411239	5-23-43
	Sou 55466	MC-411239	5-23-43
	NYC 633406	MC-411273	5-31-43

Carriers Bills:

Original Bill	F-21750-7	7-43
Supplemental Bill	F-21750-7A	11-43
Supplemental Bill	R-21750-7	8-44

Car Initial & No.		Delivered On Or About	Wgt.	Rate	Amount Billed	Amount Paid	Balance Claimed
IC	95932	6-3-43	109845	1.19	$1,208.30	$ 742.55	$ 465.75
PRR	750831	6-3-43	160095	1.19	1,761.05	1,082.24	678.81
PRR	346916	6-9-43	145500	1.19	1,600.50	983.58	616.92
Sou	176796	6-9-43	99590	1.19	1,095.49	673.23	422.26

Continued on next page

[9]

Car Initial & No.		Delivered On Or About	Wgt.	Rate	Amount Billed	Amount Paid	Balance Claimed
Continued							
PRR	344421	6- 9-43	147015	1.19	$1,617.17	$ 933.82	$ 623.35
NYC	706861	6- 9-43	142750	1.19	1,570.25	964.99	605.26
Sou	287197	6- 9-43	111655	1.19	1,228.20	754.79	473.41
SAL	96976	6-12-43	105615	1.19	1,161.77	713.96	447.81
Sou	55466	6-12-43	127500	1.19	1,402.50	858.49	544.01
NYC	633406	6-22-43	103525	1.19	1,138.78	699.83	438.95
				Total			$5,316.53

Tariff Authority: T. C. F. B. 1-W, Item 3730

General Accounting Office, Certificate No. T-215332

Claim No. 731171 2-26-44

Date of payment: February 26, 1944 [10]

Commodity: Steel and Hardware

Consignor: Union Metal Manufacturing Company

Consignee: Pacific Union Marbelite Company—United States Maritime Commission

From Canton, Ohio to Los Angeles, California, via Wheeling & Lake Erie Railway Company, Erie Railroad Company, Chicago and North Western Railway Company, Union Pacific Railroad Company and Pacific Electric Railway Company.

	Number	Date
Government B/L	MC-748457	12-23-43
Carriers Bill:		
Original Bill	F-27095-2	2-44
Supplemental Bill	R-27095-2	10-44

Car Initial & No.		Delivered On Or About	Wgt.	Tariff Rate	Amount Billed	Paid	Balance Claimed
WLE	72727	1-7-44	68680	1.27	$ 872.24		
WLE	72727	1-7-44	6120	3.50	214.20		
					$1,086.44		

Tariff Authority: T. C. F. B. 1-X, Items 3730, 3085, 3450.

Commodity: Steel Boiler K D

Consignor: Babcock Wilson Company

Consignee: Consolidated Steel Corporation—United States Maritime Commission

From Barberton, Ohio to Los Angeles Harbor, California, via Erie Railroad Company, Chicago, Rock Island and Pacific Railway Company, Southern Pacific Railroad Company and Pacific Electric Railway Company.

	Number	Date
Government B/L	MC-694508	12-7-43 [11]
Carriers Bills:		
Original Bill	F-27095-2	2-44
Supplemental Bill	R-27095-2	10-44

Car Initial & No.	Delivered On Or About	Wgt.	Tariff Rate	Amount Billed	Paid	Balance Claimed
PMcKY 91018	12-28-43	M60000	1.15	$ 690.00		
Tariff Authority	T.C.F.B. 1-X, Item 6110					
Brought forward—Bill No. F-27095-2				1,086.44		
				$1,776.44	$874.00	$902.44

Date of payment: August 4, 1944

[Endorsed]: Filed Feb. 16, 1945. Edmund L. Smith, Clerk. [12]

[Title of District Court and Cause]

ANSWER

Defendant, United States of America, for its answer to plaintiff's complaint herein denies and alleges as follows, to-wit:

I.

Denies so much of Paragraph II of plaintiff's complaint as alleges that Exhibit "A" attached to the complaint sets forth, or shows, the applicable tariff rate; and further denies so much of Paragraph II as alleges that Exhibit "A" contains reference to the lawfully published and effective tariffs containing the freight rate, or rates, applicable to the transportation of the shipments involved and conditions in connection therewith.

II.

Denies so much of Paragraph III of plaintiff's complaint as [13] alleges that plaintiff based the amounts of the charges billed defendant for said transportation services on the duly published and filed and legally effective applicable rate or rates specified in said applicable tariff or tariffs and shown as aforesaid in Exhibit "A".

III.

Denies so much of plaintiff's complaint marked Paragraph IV as alleges that the bill for $19,926.65 was based upon the lawful and applicable rate or rates as aforesaid.

IV.

Denies each and every allegation contained in plaintiff's complaint marked Paragraph VI.

Wherefore, plaintiff prays judgment dismissing the complaint herein and for its costs and disbursements.

CHARLES H. CARR
United States Attorney
RONALD WALKER
Assistant U. S. Attorney
WM. W. WORTHINGTON
Assistant U. S. Attorney
By Wm. W. Worthington
Attorneys for Defendant.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 8, 1946. Edmund L. Smith, Clerk. [14]

[Title of District Court and Cause]

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the parties hereto by their attorneys that the following evidentiary facts are true, provided that both parties shall have the right to offer other and further evidence not inconsistent therewith, and may bring to the attention of the Court any facts of which the Court may take judicial notice.

I.

Plaintiff is a common carrier by rail. In transporting all of the materials referred to in this stipulation, it acted as the last in a series of connecting carriers. All of the shipments comprised materials for use in the construction of vessels (Liberty Ships) built by California Shipbuild-

ing Corporation for the United States Maritime Commission under the latter's ship [15] construction program on a cost-plus-fixed fee basis, as follows:

Contract Number and Authority	No. of Vessels	U.S.M.C. Hulls Nos.
MCc-7785 (ESP-10) dated 3/14/41, pursuant to Act approved 2/6/41 (Public Law 5, 77th Congress), 55 Stat. 5. This contract provided, among its recitals, as follows: "Pursuant to the provisions of an Act approved February 6, 1941 (Public No. 5, 77th Congress), the Commission is authorized to construct in the United States ocean-going cargo vessels of such type, size and speed as the Commission may determine to be useful in time of emergency for carrying on the commerce of the United States, and to be capable of the most rapid construction; "The Commission has determined to have certain vessels hereinafter described constructed for the aforementioned purpose pursuant to the provisions of the foresaid Act;"	31	64— 94

Some of the costs of this contract were allocated to funds made available by Public Law 247, 55 Stat. 669, 681.

Contract Number and Authority	No. of Vessels	U.S.M.C. Hulls Nos.
MCc-7786 (DA-16) dated 5/1/41, pursuant to Joint Resolution approved 3/27/41 (Public Law 23, 77th Congress), 55 Stat. 53. This contract provided, among its recitals, as follows: "Under the provisions of Public Law No. 23 (77th Cong.), approved March 27, 1941, certain appropriations were made for the procurement by [16] manufacture or otherwise of defense articles for the government of any country whose defense the President deems vital to the defense of the United States; "The President, acting pursuant to said law, has authorized the Commission to enter into commitments for the construction of emergency type vessels similar to those which the Commission is authorized to construct under the Joint Resolution approved 2/6/41 (Public No. 5, 77th Congress);"	24	277– 300
Some of the costs of this contract were allocated to funds made available by Public Law 247, 55 Stat. 669, 681.		
MCc-2128* dated 1/17/42, pursuant to Public Law 247 (77th Congress) approved 8/25/41, 55 Stat. 669 at 681.		

*Contracts MCc-2128, MCc-7834 and MCc-13097 provide that the shipbuilding corporation may carry on the work 7 days a week and any number of shifts.

Contract Number and Authority	No. of Vessels	U.S.M.C. Hulls Nos.
This contract provided, among its recitals, as follows:		
"Under the provisions of Public Law 247 (77th Congress) approved August 25, 1941, the Commission is authorized to construct in the United States, merchant vessels of such type, size and speed as it may determine to be useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries [17] and to produce and procure parts, equipment, material and supplies for such vessels, without advertising or competitive bidding;		
"The Commission has determined that the vessels hereinafter described are of a type, size and speed which will be useful for carrying on the commerce of the United States and suitable for conversion into naval or military auxiliaries, and desires the Contractor to construct said vessels;'	109	631– 739
MCc-7834 dated 6/16/42, pursuant to Public Law 247 (77th Congress) approved 8/25/41, 55 Stat. 669 at 681. This contract provided, among its recitals, as follows:		
"Under the provisions of Public Law 247 (77th Congress) approved August		

Contract Number and Authority	No. of Vessels	U.S.M.C. Hulls Nos.
25, 1941, the Commission is authorized to construct in the United States, merchant vessels of such type, size and speed as it may determine to be useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries and to produce and procure parts, equipment, material and supplies for such vessels, without advertising or competitive bidding; "The Commission has determined that the vessels hereinafter described are of a type, size and speed which will be useful for carrying on the commerce of the United States and suitable for conversion into naval or [18] military auxiliaries, and desires the Contractor to construct said vessels;"	60	1632–1691
MCc-13097 dated 12/24/42, pursuant to Public Law 247 and Public Law 630 (77th Congress), 55 Stat. 669 at 681 and 56 Stat. 392 at 418, respectively. This contract provided among its recitals, as follows: "Under the provisions of Public Law 247 and 630 (77th Congress) the Commission is authorized to construct in the United States, merchant vessels of such type, size and speed as it may determine		

Contract Number and Authority	No. of Vessels	U.S.M.C. Hulls Nos.
to be useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries and to produce and procure parts, equipment, material and supplies for such vessels, without advertising or competitive bidding;		
"The Commission has determined that the vessels hereinafter described are of a type, size and speed which will be useful for carrying on the commerce of the United States and suitable for conversion into naval or military auxiliaries, and desires the Contractor to construct such vessels;"	62	1854–1915
MCc-13097 Addendum #2	50	(2225-2244 (2538–2567
Total	336	[19]

II.

At the time the shipments were made and delivered, California Shipbuilding Corporation and other companies were engaged in building for the United States Maritime Commission cargo ships of the "Liberty" design, E C2-S – C1.

III.

The shipbuilding program of the Maritime Commission was initiated in 1938, pursuant to the Merchant Marine

Act, 1936, 49 Stat. 1985. The program as originally planned in 1938 was the building of 50 new cargo ships a year for a period of ten years. Early in 1941, the shipbuilding program was enlarged under the authority of the Act of February 6, 1941, 55 Stat. 5, and work was begun on 200 cargo ships of the Liberty design. Later in 1941, the program was again enlarged under the authority of the Act of March 27, 1941, 55 Stat. 54 (Defense Aid Supplemental Appropriation Act), and the Act of August 25, 1941, 55 Stat. 681 (First Supplemental National Defense Appropriation Act, 1942) and the number of Liberty ships to be delivered by the end of 1943 was increased to more than 1200 ships. Under the authority of the Act of June 27, 1942, 56 Stat. 392 at page 418 (Independent Offices Appropriation Act, 1943) the program was further enlarged. The programming for new ship construction was made after consultation with the Joint Chiefs of Staff. Between 1939 and 1945, 2610 Liberty vessels, of 28,170,856 deadweight tons, were delivered by the various shipbuilding corporations. Of these, 336 vessels of 3,626,091 deadweight tons, were delivered by the California Shipbuilding Corporation.

Most of the Liberty ships were operated as merchant vessels under direction and control of War Shipping Administration through agency agreements with private operators, carrying Army and Navy cargoes, lend-lease material, raw materials, and civilian goods. Of the remainder, some were sent to lend-lease nations under charter and the others were transferred to the Army and Navy to serve as [20] combat loaders, troop ships, hospital ships, and other auxiliaries.

The ships of the Liberty design were constructed under the enlarged shipbuilding program authorized by the

Acts of February 6, 1941, March 27, 1941, August 25, 1941, and June 27, 1942. They were cargo ships designed for eleven knots, of 10,000 tons deadweight capacity and of a design approved by the Maritime Commission in 1940 for mass production. They were adapted from an old design for a common type of British coal-burning tramp steamer. The modifications in design were the use of electrical welding instead of riveting in the construction of the hull and the addition of a deep ballast tank for oil.

IV.

All of such shipments were consigned on Government bills of lading and were delivered to the Maritime Commission, c/o California Shipbuilding Corporation, Los Angeles, California, or to California Shipbuilding Corporation for account of the Maritime Commission. All the purchases were assigned a War Production Board Priority of A-1-a, A-1-b, or A-1-c and in the case of contract MCc-7300, a priority of AA-1, which were high priorities.

Some of the bills of lading referred to the "military or naval" character of the shipments. Some of the bills of lading made no such reference. When the reference appears on any bill, that fact is specifically noted in this stipulation.

The Government bills of lading referred to herein were prepared and furnished by or on behalf of the Maritime Commission. All the materials included in the shipments set forth in this stipulation were purchased with funds from the same appropriations as the appropriations from which the freight charges were paid.

The appropriation "69X0200 Construction Fund, U. S. Maritime Commission, Act of June 29, 1936, Revolving Fund" refers to the fund created by the Merchant Marine Act, 1936, Section 1116, U. S. C. A. The appropriation "69X0201 Emergency Ship Construction Fund, U. S. M. C." [21] has reference to the fund created by the Act of February 6, 1941, Public Law 5, 77th Congress. The appropriation "69-111/30023 Defense Aid, Vessels and Watercraft, (Allot. to U. S. Mar. Com.) 1941-1943" has reference to one of the funds created by the Act of March 27, 1941, Public Law 23, 77th Congress, for carrying out the purposes of the Lend-Lease Act, Act of March 11, 1941, Public Law 11, 77th Congress. [22]

V.

All carriers by railroad owning and operating or operating lines of railroad constructed with the aid of grants of land received from the United States, either directly or through a predecessor or predecessors in interest, participating in the transportation of the shipments herein described, and each of them, and all carriers by railroad owning and operating or operating lines of railroad constructed with the aid of grants of land received from the United States, either directely or through a predecessor or predecessors in interest, parties to and participating in any land grant route or routes with which the route or routes of movement of the said shipments herein described were equalized under agreement with the United States from the standpoint of net charges to the United States for transportation service, and each of them, had, prior to and at the time of said shipments, filed with the Secretary of the Interior of the United States, in the form and manner prescribed by him, releases of all of their, and its, claims against the United States to lands, interests

in lands, compensation, or reimbursement on account of lands and interest in lands which have been granted, claimed to have been granted, or which it was claimed should have been granted to any such carrier or predecessor in interest under any grant to such carrier or predecessor in interest, in full and complete compliance with the provisions and requirements of paragraph (b) of Section 321 of Part II, Title III, of the Transportation Act of 1940 (54 Stat. L. 954). Each of such releases so filed was approved by the Secretary of the Interior prior to the shipments in question and the performance of the transportation service herein set forth.

VI.

Pertaining to Carrier's Bill No. F-18436-3, Page 6 of Petition:

On March 12, 1943, plaintiff delivered condensers [23] (machinery) consigned January 26, 1943 by Foster Wheeler Corporation, Carteret, New Jersey, covered by bill of lading No. MC-218872 issued September 23, 1942, which was stamped "military or naval property of the United States moving for military or naval and not for civil use". The shipment comprised material furnished under purchase order No. CD-MC-42-110 (MCc-3173) dated December 12, 1941, and these materials were purchased for use in the construction of United States Maritime Commission hulls Nos. 1800-1909. This purchase order provided, "Terms of delivery f.o.b. Carteret, N. J." and specified shipment on government bill of lading.

Plaintiff billed its charges for this shipment in its original bill No. F-18436-3 for $1,093.39, representing the full commercial rate.

Defendant, claiming that the charge was subject to land grant rates, disallowed $375.40 and paid $717.99. Payment for the shipment of this freight was charged to appropriation "69X0200 Construction Fund, U. S. Maritime Commission, Act of June 29, 1936, Revolving Fund".

Plaintiff protested the disallowance of $375.40 and payment of only $717.99 on its bill No. F-18436-3, and billed defendant by supplemental bill for the sum of $375.40. If the shipment was entitled to the land-grant rate, this disallowance was correct and nothing further is due on this bill; if not, plaintiff is entitled to recover $375.40.

VII.

Pertaining to Carrier's Bill No. F-26475-1, Page 7 of Petition:

Plaintiff submitted its bill No. F-26475-1 to the United States Maritime Commission for $3,272.81 for transportation services. Defendant deducted from said bill claimed overpayments of the following amounts on the following prior bills and paid plaintiff the sum of $212.70 cash: [24]

Bill Number	Amount
F-10611-1	$ 600.51
F-10503-12	321.02
F-10610-1	811.08
F-10540-1	1,327.50
	$3,060.11

Plaintiff protested the deduction of $3,060.11 from its bill No. F-26475-1 and received the $212.70 paid under protest, and billed defendant on its supplemental bill for

$3,060.11. In its petition, plaintiff gave defendant a credit of $706.75 on its bill No. F-10540-1, leaving a balance in dispute of $2,353.36.

The following are the facts in respect to each of the bills which defendant used as the basis for deductions from bill No. F-26475-1:

Facts as to Bill No. F-10611-1:

On January 20, 1942, plaintiff delivered power boilers and fixtures consigned on December 16 and 17, 1941 by Combustion Engineering Company, Inc., Chattanooga, Tennessee. The shipment was covered by bill of lading MC-21162 issued September 27, 1941. The shipment comprised material furnished under contract No. MCc-(ESP)-1008 dated April 14, 1941, which was for 200 hulls, later increased by 29 hulls, and these materials were moving for use in the construction of U. S. M. C. hulls Nos. 64-94. This contract provides for a price f.o.b. point of shipment, and shipment on Government bill of lading. Section 14 of the commitment letter of March 8, 1941, provided:

> "Time is of the essence of this contract, and it is understood that the principal Vendor will diligently prosecute production, including overtime where advantageous, to effect delivery as rapidly as possible, and if possible, considerably in advance of the schedule set forth in the following paragraph:" [25]

Plaintiff billed its charges for this shipment in its original bill No. F-10611-1 for $1,345.50, representing the full commercial rate. This bill was paid in full, the payment being charged $758.86 to appropriation "69X0201 Emergency Ship Construction Fund, U. S. M. C.",

$586.64 to appropriation "69-111/30023 Defense Aid, Vessels and Watercraft, (Allot. to U. S. Mar. Com.) 1941-1943".

On May 14, 1943, defendant demanded a refund of $600.51 representing the difference between the full commercial rate and the land-grant rate on the shipment covered by bill of lading MC-21162. Plaintiff refused the refund and defendant deducted the $600.51 from bill No. F-26475-1. If this shipment was entitled to land-grant rates, the correct charges would be $744.99, and deduction of $600.51 from bill No. F-26475-1 was proper; if not, the charge of $1,345.50 was correct, and no portion thereof should have been disallowed, or deducted from bill No. F-26475-1 or from any other bill, and plaintiff is entitled to recover said sum of $600.51.

Facts as to Bill No. F-10503-12:

On December 29, 1941, plaintiff delivered steel plates consigned on December 9, 1941 by Inland Steel Company-Indiana Harbor Works, Indiana Harbor, Indiana. The shipment in question was covered by bill of lading No. MC-88579 issued November 25, 1941.

Plaintiff billed its charges for these shipments in its original bill No. F-10503-12 for $2,069.76, representing the full commercial rate. This bill was paid in full, payment being charged $1,167.34 to appropriation "69X0201 Emergency Ship Construction Fund, U. S. M. C.", and $902.42 to appropriation "69-111/30023 Defense Aid, Vessels and Watercraft, (Allot. to U. S. Mar. Com.) 1941-1943".

On August 6, 1943, defendant demanded a refund of $321.02 representing the difference between the full commercial rate and the land-grant rate on the shipment covered by bill of lading No. [26] MC-88579. Plaintiff refused the refund and defendant deducted the $321.02 from bill No. F-26475-1.

The shipment covered by bill of lading No. MC-88579 comprised material furnished under contract No. MCc(ESP)-1520 dated August 12, 1941, and these materials were purchased for use in the construction of U. S. M. C. hulls Nos. 64-94, and 277-300. This contract provided, among other matters:

(a) Inland Steel was requested to furnish engine room and boiler plates "in accordance with attached . . . Inland Steel Co. proposal of June 27, 1941 (6/28/41-#148) - - - -"

(b) Prices were "Delivered Base Prices per 100# FOB Cars" Los Angeles, Calif.

(c) "Title to all of the products covered by this order will remain in the Seller until delivery thereof has been made to the Buyer at the destination herein named." (i. e., Los Angeles).

(d) "The Seller's responsibility for delivery shall terminate on the arrival of the material at the destinations shown in this order."

(e) "Cash discount to be allowed on discount base as stated on invoice, being the delivered price of the material less the transportation charges taken into account in arriving at such price."

(f) "Such changes as may occur in the tariff freight rates or transportation charges used in determining the delivered prices provided for in this contract, except switching charges, after date of order, and on or prior to date of shipments will be for account of Buyer."

(g) Shipments were to be on Government bill of lading.

(h) "The equipment ordered herein is required for the [27] construction of emergency cargo vessels."

(i) "There are no written understandings or agreements between the Buyer and Seller relative to this order that are not fully referenced or expressed herein."

The Inland Steel Company proposal of June 27, 1941 referred to in paragraph (a) above, stated, among other matters:

> "This price is for material shipped to and including September 30, 1941, after which time the price will be the published price at Chicago, Illinois, in effect at the time of shipment, plus the all-rail freight rate to the three destinations."
>
> "If the Government wishes to take possession of this material at our plant and ship on Government Bills of Lading in order to take advantage of land grant freight rates, we will deduct the regular commercial freight rate, which at present is $1.10 per 100 lbs."

If this shipment was entitled to land-grant rates, the correct charges would be $1,748.74, and deduction of $321.02 from bill No. F-26475-1 was proper; if not, the charge of $2,069.76 was correct, and no portion thereof should have been disallowed or deducted from bill No. F-26475-1 or from any other bill, and plaintiff is entitled to recover said sum of $321.02.

Facts as to Bill No. F-10610-1:

On January 23, 1942, plaintiff delivered a shipment covered by two bills of lading. Bill of Lading No. MC-22992, issued October 3, 1941, covered steel angles and steel channels consigned on December 29, 1941 by Carnegie-Illinois Steel Corporation, manufactured under contract No. MCc-(ESP)-1145 dated June 20, 1941. Bill of Lading No. MC-19113, issued September 19, 1941, covered steel plates consigned on January 6, 1942 by Jones [28] & Laughlin Steel Corporation, manufactured by it under contracts Nos. MCc-ESP-1016 and MCc-ESP-1083 dated April 16, 1941 and May 17, 1941, respectively.

Contract No. MCc(ESP)-1145 set forth a schedule of "Delivered base prices per 100# F.O.B. Cars Los Angeles, Cal.", and specified that "Title to all of the products covered by this order will remain in the Seller until delivery thereof has been made to the Buyer at the destination herein named", and that "Shipment to be made on Government Bill of Lading". The destination named was Los Angeles, California. These steel angles and steel channels purchased under contract No. MCc(ESP)-1145 were purchased for use in the construction of U. S. M. C. hulls Nos. 277-300.

Contract No. MCc(ESP)-1083 set forth a schedule of prices as follows:

"Price:

Base prices per 100 lb. delivered f.o.b. cars at the shipyard, Los Angeles, California, as follows, depending on the method of shipment:

All rail shipment	$3.37
All rail shipment on Government Bill of Lading allowing commercial rate of freight at $1.27 per 100 lb.	3.37
Via rail and water	2.98"

It prescribed shipment on government bill of lading. These steel plates purchased under contract MCc(ESP)-1083 were purchased for use in the construction of U. S. M. C. hulls Nos. 277-300.

Contract No. MCc(ESP)-1016 set forth a schedule of prices identical with the schedule under contract MCc-(ESP)-1083. The contract stated that it was "in accordance with U. S. M. C. (By G & C) letter No. 1133/S11 (BB2-153), dated April 1, 1941, hereto [29] attached". The letter stated, in part:

> "In respect of prices, the United States Maritime Commission has directed that your base price, amounting to $2.10 per 100 pounds, f.o.b. your mill be accepted, shipment to be on Government bill of lading, or as the United States Maritime Commission may direct – – –"

These steel plates purchased under contract MCc(ESP)-1016 were purchased for use in the construction of U. S. M. C. hulls Nos. 64-94.

Plaintiff billed its charges for these shipments in its original bill No. F-10610-1 for $2,068.88, representing the full commercial rates, as follows:

Bill of Lading No.	Amount Billed	Amount in Dispute
MC-22992	$ 515.42	$201.89
MC-19113	1,553.46	609.19
	$2,068.88	$811.08

This bill was paid in full, $1,166.85 being charged to appropriation "69X0201 Emergency Ship Construction Fund, U. S. M. C.", and $902.03 to appropriation "69-111/30023—Defense Aid, Vessels and Watercraft, (Allot. to U. S. Mar. Com.) 1941-1943". On August 18, 1943, defendant demanded a refund of $811.08 representing the difference between the full commercial rate and the land-grant rate on the shipments covered by bills of lading Nos. MC-22992 and MC-19113. Plaintiff refused the refund and defendant deducted the $811.08 from bill No. F-26475-1. If this shipment was entitled to land-grant rates, the correct charges would have been $1,257.80 and the deduction of $811.08 from bill No. F-26475-1 was proper; if not, the charge of $2,068.88 was correct as billed, and no portion thereof should have been disallowed, or deducted from bill No. F-26475-1 or from any other bill; and plaintiff is entitled to recover said sum of $811.08.

Facts as to Bill No. F-10540-1:

This bill covered charges for shipments under six bills [30] of lading Nos. MC-28270, MC-27046, MC-08411, MC-27036, MC-34759 and MC-34905, only two of which are in dispute, as follows:

On January 6, 1942, plaintiff delivered the shipment under bill of lading No. MC-28270, issued October 13, 1941, covering steel plates consigned on December 21, 1941 by Otis Steel Company, manufactured by it under purchase order No. MCc(ESP)-1837 dated September 8, 1941. These steel plates purchased under purchase order No. MCc(ESP)-1837 were purchased for use in the construction of U. S. M. C. hulls Nos. 64-94 and hulls Nos. 277-300.

On January 8, 1942, plaintiff delivered the shipment under bill of lading No. MC-34759, issued December 11, 1941, covering steel sheets consigned on December 22, 1941 by Youngstown Sheet & Tube Company, manufactured by it under purchase order No. MCc(ESP)-2690 dated November 27, 1941. These steel sheets purchased under purchase order No. MCc(ESP)-2690 were purchased for use in the construction of U. S. M. C. hulls Nos. 64-94 and hulls Nos. 277-300.

The purchase orders and contract under which the material was bought by the Commission specified shipment on Government bill of lading.

Purchase order No. MCc(ESP)-1837 provided under Price:

> "Price—Delivered Base Price
>
> per 100 lbs. f.o.b. Cleveland, Ohio, plus freight all rail in carload lots of 40,000# minimum East Coast and Gulf points, 40,000# minimum West Coast points.
>
> Terminal Island, Los Angeles, California Unit Price $3.37 Any increase or decrease in freight rate will result in a corresponding increase or decrease in delivered price."

It also provided that: "Price quoted herein is based [31] on freight rates in effect at date of this quotation. If any increase or decrease in freight rates shall become effective prior to acceptance of this quotation by the Buyer, the price shown herein shall be revised accordingly."

The price in Purchase Order No. MCc(ESP)-2690 was "$2.60 per 100# net f.o.b. your mill, Youngstown, Ohio . . ." Purchase orders Nos. MCc(ESP)-1837 and MCc(ESP)-2690 provided that the Seller's responsibility should terminate on arrival of the shipment at the "fabricating point", and that, "The goods covered herein are the property of the Seller until delivered to the Buyer at the Buyer's fabricating point [Los Angeles] herein specified and shall not be diverted or reconsigned without permission of the Seller."

Plaintiff billed its charges under the two bills of lading in dispute, in its original bill No. F-10540-1, for $1,558.04, representing the full commercial rate, as follows:

Bill of Lading No.	Amount Billed	Amount in Dispute
MC-28270	$1,050.04	$420.02
MC-34759	508.00	200.73
	$1,558.04	$620.75

The bill was paid in full, payment being charged in part to appropriation "69X0201—Emergeny Ship Construction Fund, U. S. M. C.", and in part to appropriation "69-111/30023—Defense Aid, Vessels and Watercraft, (Allot. to U. S. Mar. Com.) 1941-1943".

On August 23, 1943, defendant demanded a refund of $620.75 representing the difference between the full com-

mercial rate and the land-grant rate on the shipments covered by bills of lading Nos. MC-28270 and MC-34759. Plaintiff refused the refund and defendant deducted the $620.75 from bill No. F-26475-1. If this shipment was entitled to land-grant rates, the correct charge would have been $937.29 and the deduction of $620.75 from bill No. F-26475-1 was proper; if not, the charge of $1,558.04 [32] was correct as billed, and no portion thereof should have been disallowed, or deducted from bill No. F-26475-1 or from any other bill, and plaintiff is entitled to recover said sum of $620.75.

VIII.

Pertaining to Carrier's Bill No. F-21750-7, Pages 8 and 9 of Petition:

Between June 14, and June 23, 1943, plaintiff delivered steel plates consigned between May 16 and May 31, 1943, by Republic Steel Corporation, Alabama City, Alabama, covered by bills of lading Nos. MC-411214, MC-411234, MC-411239 and MC-411273 issued April 6, 1943, all of which were stamped "military or naval property of the United States moving for military or naval and not for civil use". The shipments comprised material furnished under contract No. MCc-7300, purchase order No. PD-MC-43-10664, dated March 4, 1943, and these materials were purchased for use in the construction of U. S. M. C. hulls Nos. 1880-1909. This purchase contract provided for delivery F.O.B. mill (Alabama City), for shipment on government bill of lading, and "In accepting this order

it is understood that you agree to all the terms and conconditions expressly written or referred to herein including General Provisions, Form 4584 which are made a part hereof." Form 4584, among General Provisions, provides:

> "Title to all materials, equipment, and supplies and other property assembled at Vendor's plant or elsewhere, or ordered for use in connection with the performance of the work under the contract, to the extent that Buyer makes payment therefor, even though delivery thereof has not been made, shall vest in Buyer."

No information is available as to when these materials were paid for in relation to the time of shipment.

Plaintiff billed its charges for this shipment in its original bill No. F-21750-7 for $13,778.46, representing the full [33] commercial rate. Of this amount defendant disallowed $5,312.62, which is the difference between land-grant rates and full commercial rates, paid plaintiff $7,547.26 cash, and deducted $918.58 for claimed overpayments of prior bills. Plaintiff protested the disallowance of $5,312.62, but did not protest the deduction of $918.58, and by supplemental bill, billed defendant for $5,312.62. The payments of this bill were charged to appropriation "69X0200 Construction Fund, U. S. Maritime Commission, Act of June 29, 1936, Revolving Fund" If this shipment was entitled to land-grant rates, the correct charges would be $8,465.84; if not, the correct charges would be $13,778.46 and plaintiff is entitled to recover $5,312.62.

IX.

Pertaining to Carrier's Bill No. F-27095-2, Pages 10 and 11 of Petition:

Plaintiff submitted its bill No. F-27095-2 to the United States Maritime Commission for $1,776.44 for transportation services. Of this amount defendant paid plaintiff $874.00 cash, and deducted $902.44 for claimed overpayments for the following amounts on the following prior bills:

Bill Number	Amount
F-10535-1	$496.69
F-11274-4	405.75
Balance in Dispute	$902.44

Plaintiff protested the deduction of $902.44 from its bill No. F-27095-2, and received the $874.00 paid under protest, and billed defendant by its supplemental bill for $902.44.

The following are the facts in respect to each of the bills which were the basis of the deduction of $902.44:

Facts as to Bill No. F-10535-1:

Between January 3, 1942 and January 9, 1942, plaintiff delivered engine parts consigned between December 17, 1941 and January 1, 1942, by Joshua Hendy Iron Works, Sunnyvale, California. [34] These shipments were covered by bills of lading Nos. MC-16624, MC-16623, MC-16626, MC-16627 and MC-16629, issued September 3, 1941.

These engine parts were purchased under contract No. MCc(ESP)-1028 dated April 16, 1941, which provided, in part, as follows:

> "F.O.B. Point: Cars, Sunnyvale, Calif.
>
> "Shipping Instructions: Shipment to be made on Government Bill of Lading to be furnished later.
>
> "Title to all materials, equipment and supplies and other property assembled at the Vendor's plant or elsewhere or ordered for use in connection with the performance of the work under this commitment to the extent that the Buyer makes payment therefor, even though delivery thereof has not been made, shall vest in the Buyer. This provision as to title shall not operate to relieve the Vendor of any of its obligations under this commitment."

The contract provides for payment of 90% of total price by time of delivery to a transportation agency. These engine parts were purchased for use in construction of U. S. M. C. hulls Nos. 64-94.

Plaintiff billed its charges for these shipments in its original bill No. F-10535-1 for $1,905.19, representing the full commercial rate. The bill was paid in full, payment being charged $1,074.53 to appropriation "69X0201 Emergency Ship Construction Fund, U. S. M. C.", and $830.66 to "69-111/30023 Defense Aid, Vessels and Watercraft (Allot. to U. S. Mar. Com.) 1941-1943".

On September 2, 1943, defendant demanded a refund of $496.69 representing the difference between the full commercial rate and the land-grant rate on the shipments covered by bills of lading Nos. MC-16624, MC-16623, MC-16626, MC-16627 and [35] MC-16629.

Plaintiff refused the refund and defendant deducted the $496.69 from bill No. F-27095-2. If this shipment was entitled to land-grant rates, the correct charges would be $1,407.50, and deduction of $496.69 from bill No. F-27095-2 was proper; if not, the charge of $1,905.19 was correct, and no portion thereof should have been disallowed or deducted from bill No. F-27095-2 or from any other bill, and plaintiff is entitled to recover said sum of $496.69.

Facts as to Bill No. F-11274-4:

Between April 18, 1942 and April 20, 1942, plaintiff delivered engine parts consigned between February 23, and April 6, 1942 by Joshua Hendy Iron Works, Sunnyvale, California. These shipments were covered by bills of lading Nos. MC-37295, MC-37321, MC-37322, MC-37325 and MC-37326, issued December 18, 1941.

These engine parts were purchased under contract No. MCc(ESP)-1020 dated April 16, 1941, for 200 hulls. The contract contained provisions similar to those referred to in contract No. MCc(ESP)-1028, which covered shipments referred to on bill No. F-10535-1. The engine parts here in question were moving for use in construction of U. S. M. C. hulls Nos. 64-94.

Plaintiff billed its charges for these shipments in its original bill No. F-11274-4 for $1,556.35, representing the full commercial rate. The bill was paid in full, payment being charged $877.78 to appropriation "69X0201 Emergency Ship Construction Fund, U. S. M. C.", and $678.57 to "69-111/30023 Defense Aid, Vessels and Watercraft (Allot. to U. S. Mar. Com.) 1941-1943".

On September 11, 1943, defendant demanded a refund of $405.75 representing the difference between the full

commercial rate and the land-grant rate on the shipments covered by bills of lading Nos. MC-37295, MC-37321, MC-37322, MC-37325 and [36] MC-37326. Plaintiff refused the refund and defendant deducted the $405.75 from bill No. F-27095-2. If this shipment was entitled to land-grant rates, the correct charges would be $1,150.60, and deduction of $405.75 from bill No. F-27095-2 was proper; if not, the charge of $1,556.35 was correct and no portion thereof should have been disallowed, or deducted from bill No. F-27095-2 or from any other bill, and plaintiff is entitled to recover said sum of $405.75.

X.

Either party may object to the relevance or materiality of any facts herein set forth. Any of the documents referred to herein may be introduced in evidence (subject to objection as to relevancy or materiality) by either party, by photostatic copies without further proof of authentication.

Dated this 25 day of Oct., 1946.

FRANK KARR
C. W. CORNELL
E. D. YEOMANS
Attorneys for Plaintiff

JAMES M. CARTER
U. S. Atty.
RONALD WALKER and
CHARLES H. VEALE
Asst. U. S. Attys.
Attorneys for Defendant

[Endorsed]: Filed Oct. 25, 1946. Edmund L. Smith, Clerk. [37]

[Title of District Court and Cause]

STIPULATION

Defendant claims that it has or may have several causes of action pleadable as counterclaims in this action.

Plaintiff and defendant agree that for the purpose of limiting the number of questions at issue herein, it is desirable to defer the litigation of the matters which defendant's counter-claims would put in issue.

Accordingly, plaintiff and defendant stipulate and agree:

If in any future action or proceeding, defendant should seek to recover on or establish any claims which might have been pleaded by way of set-off or counterclaim in this action, plaintiff will not plead as a defense thereto the omission of defendant to [38] plead such set-offs or counter-claims in this action.

Dated this 25 day of Oct., 1946.

FRANK KARR
C. W. CORNELL
E. D. YEOMANS
Attorneys for Plaintiff

JAMES M. CARTER
U. S. Atty.
RONALD WALKER and
CHARLES H. VEALE
Asst. U. S. Attys.
Attorneys for Defendant

[Endorsed]: Filed Oct. 25, 1946. Edmund L. Smith, Clerk. [39]

[Title of District Court and Cause]

MEMORANDUM OF DECISION

Pacific Electric Railway Company, a common carrier by rail, has brought this suit under the Tucker Act [28 U. S. C. §41(20)] to recover the balance allegedly due on shipments of freight carried during the years 1941 to 1944. The freight consisted of various materials required for the construction of "Liberty" ships built for the United States Maritime Commission.

The shipments in controversy were carried on Government bills of lading, and were consigned to the United States Maritime Commission, at Los Angeles harbor.

As the last in a serious of connecting carriers, plaintiff submitted bills for such transportation, basing the charges [40] on commercial tariff rates.

All carriers participating in the transportation services were either land-grant aided railroads, or were subject to rate equalization agreements "to accept land-grant rates for shipments [such as those involved in the case at bar] which the United States could alternately move over a land-grant road." [United States v. Powell, ... U. S. ..... (March 3, 1947).] Releases permitted by the Transportation Act of 1940 [49 U. S. C. §65] had been filed by all land-grant carriers involved.

Hence the applicable rates are governed by §321(a) of the Act, which provided, prior to amendment in 1945 [79th Cong., 1st Sess., P. L. 256, c. 573, §3; 59 Stat. 607] that "the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the

foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use . . ." [49 U. S. C. §65(a).]

Maintaining that pursuant to the above-quoted provisions of §321(a) the shipments were entitled to land-grant rates, the Government paid plaintiff's freight bills accordingly. Plaintiff now seeks to recover the difference [41] between the land-grant rates and the full commercial rates.

Determination of whether the shipments in question were entitled to land-grant rates involves two questions: (1) Whether the materials covered by the bills of lading were the property of the United States at the time of shipment? and (2) if Government property, whether "military or naval property . . . moving for military or naval and not for civil use" within the meaning of §321(a)?

The recent decision by the Supreme Court in Northern Pacific Ry. v. United States, ... U. S. ..... (March 3, 1947), is controlling as to the second question. If Government property, this court is bound by that precedent to hold the shipments entitled to land-grant rates pursuant to §321(a).

Most of the shipments were admittedly Government property at the time of carriage. As to these shipments, plaintiff has been fully paid.

However, as to the shipments covered by its freight bills Nos. F-10503-12, F-10610-1 and F-10540-1, plaintiff contends that title to the property did not pass to the Government until shipment was completed.

Bill No. F-10503-12 was for transportation on Government bill of lading MC-88579 issued November 25,

1941, covering steel plates furnished under contract MCc(ESP)-1520 between the Maritime Commission and Inland Steel Company. [42]

Bill No. F-10610-1 was for transportation on Government bills of lading MC-22992 and MC-19113. Bill of lading MC-22992, issued October 3, 1941, covered steel angles and steel channels furnished under contract MCc-(ESP)-1145 between the Maritime Commission and Carnegie-Illinois Steel Corporation. Bill of lading MC-19113, issued September 19, 1941, covered steel plates furnished under contracts MCc(ESP)-1016 and MCc(ESP)-1083 between the Maritime Commission and Jones & Laughlin Steel Corporation.

Bill No. F-10540-1 was for transportation on six Government bills of lading, of which only MC-28270 and MC-34759 are in dispute. Bill of lading MC-28270, issued October 13, 1941, covered steel plates furnished under contract MCc(ESP)-1837 between the Maritime Commission and Otis Steel Company. Bill of lading MC-34759, issued December 11, 1941, covered steel sheets furnished under contract MCc(ESP)-2690 between the Maritime Commission and Youngstown Sheet & Tube Company.

It is the rule in most jurisdictions that the time of transfer of title as between seller and buyer is to be determined by the intention of the parties to be gathered from their conduct, the terms of the contract, the usages of the trade and other circumstances surrounding the transaction. [Uniform Sales Act, §§17, 18.] [43]

That all the shipments in controversy were on Government bills of lading would ordinarily indicate the parties intended that title pass to the buyer upon delivery to the carrier at point of shipment. "The general rule is that

title passes from seller to buyer with the delivery of the goods." [Louisville & Nashville R. R. v. United States, 267 U. S. 395, 400 (1925).] And in United States v. Andrews, 207 U. S. 229, 240 (1907), the Supreme Court held: "That as a general rule the delivery of goods by a consignor to a common carrier for account of a consignee has effect as delivery to such consignee is elementary."

However, the fact that goods are shipped on Government bills of lading is not conclusive as to Government ownership of the property. [United States v. Galveston, Harrisburg & San Antonio Ry., 279 U. S. 401 (1929); Louisville & Nashville R. R. v. United States, supra, 267 U. S. at 398; Henry H. Cross Co. v. United States, 133 F. (2d) 183, 186 (C. C. A. 7th, 1943).]

Contract MCc(ESP)-1520 required that all shipments be made on Government bills of lading, that cash discounts were to be allowed on delivered price less transportation charges and that changes in freight rates were for the account of the buyer. These factors indicate an intention to pass title upon delivery to the carrier.

The contract further stipulated that the material was to be furnished in accordance with the seller's proposal [44] of June 27, 1941. That proposal provided, among other things, that if the Government desired to take advantage of land-grant rates, the buyer might take possession at the seller's plant and ship on Government bills of lading and the seller would deduct the regular commercial freight rates from the price. Such provisions also point to an intention to transfer title upon delivery to the carrier.

To the contrary, however, the contract expressly provided that the seller's responsibility for delivery would

not terminate until arrival of the material at destination and that: "Title to all of the products covered by this order will remain in the seller until delivery thereof has been made to the buyer at the destination herein named."

Contracts MCc(ESP)-1145, MCc(ESP)-1837 and MCc(ESP)-2690 also provided that all shipments were to be on Government bill of lading, but that title should remain in the seller until delivery at destination.

The usual indicia of intention become immaterial in the face of an express contractual provision reserving title in the seller during shipment.

The Government urges that the manifest inconsistency of reserving title in the seller and shipping by Government bill of lading is but an "oversight". Be that as it may, the law does not permit a court to read out of a contract language expressly reserving title in the seller until delivery at [45] destination.

The record here indicates that it was not until December of 1942 that the Maritime Commission thought of claiming land-grant rates; whereas the contracts in question were negotiated, and the relevant bills of lading were issued a year or more prior to that time.

"Congress, by writing into §321(a) an exception, retained for the United States an economic privilege of great value." [Northern Pacific Ry. v. United States, supra, ... U. S. at .....] But "oversight" on the part of the Maritime Commission in the drafting of contracts cannot defeat plaintiff's right to the full commercial rates for transportation of "military or naval" materials which were not the property of the Government at the time of shipment. [United States v. Galveston, Harrisburg & San Antonio Ry., supra, 279 U. S. at 405; Louisville & Nashville R. R. v. United States, supra, 267 U. S. at 401.

Cf. Oregon-Washington R. R. & Nav. Co. v. United States, 255 U. S. 339 (1921).]

Contracts MCc(ESP)-1083 and MCc(ESP)-1016 set forth a schedule of destination prices and provide that if shipment be made on Government bills of lading the price would be the destination price less an allowance for commercial rate of freight. The materials involved were shipped on Government [46] bills of lading, and the contracts contain no provision reserving title in the seller until delivery at destination. Thus the usual indicia of intention govern, and it must be held that the parties intended passage of title upon delivery to the carrier. Accordingly, the shipment covered by Government bill of lading MC-19113 was entitled to move at land-grant rates, and plaintiff has been fully paid as to that shipment.

Inasmuch as the materials furnished under contracts MCc(ESP)-1520, MCc(ESP)-1145, MCc(ESP)-1837 and MCc(ESP)-2690 were not the property of the United States at the time of shipment, hence not entitled to transportation at land-grant rates, plaintiff is entitled to recover $1,143.66 representing the unpaid balance—the difference between the full commercial rates and the land-grant rates—on shipments covered by Government bills of lading MC-88579, MC-22992, MC-28270 and MC-34759.

Counsel for plaintiff will submit findings of fact, conclusions of law and judgment pursuant to local rule 7 within ten days.

May 19, 1947.

WM. C. MATHES
United States District Judge

[Endorsed]: Filed May 19, 1947. Edmund L. Smith, Clerk. [47]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above case came on regularly for trial on the 29th day and 30th day of October, 1946, before the Honorable William C. Mathes, Judge presiding, sitting without a jury, Frank Karr, C. W. Cornell and E. D. Yeomans appearing as attorneys for plaintiff, James M. Carter, United States Attorney, by Charles H. Veale, Assistant United States Attorney, George Galland, Attorney, United States Maritime Commission, and Hubert H. Margolies, Attorney, United States Department of Justice, appearing for defendant, and the parties having filed a Stipulation of Facts and a Stipulation limiting the issues, and additional oral and documentary evidence having been introduced, [48] and the Court having considered the same and heard the arguments of counsel and being fully advised, and having rendered a Memorandum of Decision, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

That the facts contained in paragraphs I, II, III, IV, V, VI, VII, VIII, and IX of the Stipulation of Facts filed herein are true, and said Stipulation of Facts is by reference incorporated and made a part of these findings.

CONCLUSIONS OF LAW

From the foregoing facts, the Court makes the following conclusions of law:

I.

That all the shipments involved in this action were shipments of "military or naval property moving for military or naval and not for civil use" within the meaning of Section 321(a) of the Transportation Act of 1940.

II.

That all the shipments involved in this action, except shipments covered by Government bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759 were property of the United States at the time of shipment.

III.

That the shipments covered by Government bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759 were not the property of the United States at the time of shipment.

IV.

That defendant was entitled to land-grant rates on all the shipments involved in this action other than the shipments covered by Government bills of lading Nos. MC-88579, [49] MC-22992, MC-28270 and MC-34759.

V.

That the plaintiff is entitled to full commercial rates on the shipments covered by Government bills of lading Nos. MC-88579, MC-22992; MC-28270 and MC-34759.

VI.

That plaintiff is entitled to recover from the defendant the sum of $1,143.66, said sum being the difference between full commercial rates and land-grant rates on shipments covered by Government bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759.

Dated this 4 day of September, 1947.

WM. C. MATHES

Judge

Approved this 3 day of September, 1947. James M. Carter, United States Attorney; by Charles H. Veale, Assistant United States Attorney.

[Endorsed]: Filed Sep. 5, 1947. Edmund L. Smith, Clerk. [50]

In the District Court of the United States in and for the Southern District of California

Central Division

No. 4256-WM Civil

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above case came on regularly for trial on the 29th day and 30th day of October, 1946, before the Honorable William C. Mathes, Judge presiding, sitting without a jury, Frank Karr, C. W. Cornell and E. D. Yeomans appearing as attorneys for plaintiff, James M. Carter, United States Attorney, by Charles H. Veale, Assistant United States Attorney, George Galland, Attorney, United States Maritime Commission, and Hubert H. Margolies, Attorney, United States Department of Justice, appearing for defendant, and the parties having filed a Stipulation of Facts and a Stipulation limiting the issues, and additional oral and documentary evidence having been introduced, and the Court having considered the same and heard the arguments [51] of counsel and being fully advised, and having rendered a Memorandum of Decision, and having made its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Ordered, Adjudged and Decreed:

I.

That all the shipments involved in this action were shipments of "military or naval property moving for

military or naval and not for civil use" within the meaning of Section 321(a) of the Transportation Act of 1940.

II.

That all the shipments involved in this action, except shipments covered by Government bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759 were property of the United States at the time of shipment.

III.

That the shipments covered by Government bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759 were not the property of the United States at the time of shipment.

IV.

That defendant was entitled to land-grant rates on all the shipments involved in this action other than the shipments covered by Government bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759.

V.

That the plaintiff is entitled to full commercial rates on the shipments covered by Government bills of lading [52] Nos. MC-88579, MC-22992, MC-28270 and MC-34759.

VI.

That plaintiff recover from defendant the sum of $1,143.66, said sum being the difference between full commercial rates and land-grant rates on shipments covered by Government bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759.

Dated this 4 day of September, 1947.

WM.C.MATHES
Judge

Approved this 3 day of September, 1947. James M. Carter, United States Attorney; by Charles H. Veale, Assistant United States Attorney.

Judgment entered Sep. 5, 1947. Docketed Sep. 5, 1947. C. O. Book 45, page 277. Edmund L. Smith, Clerk; by Louis J. Somers, Deputy.

Received copy of the within this 16th day of June. Charles H. Veale, Asst. U. S. Atty., Attorney for Deft.

[Endorsed]: Filed Sep. 5, 1947. Edmund L. Smith, Clerk. [53]

[Title of District Court and Cause]

NOTICE OF APPEAL

You Will Please Take Notice that the United States of America, defendant and appellant herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the above-entitled District Court entered September 5, 1947, in favor of plaintiff and against said defendant, and from the whole thereof.

JAMES M. CARTER
United States Attorney
RONALD WALKER
Assistant United States Attorney
Attorneys for Defendant and Appellant

[Endorsed]: Filed & mld. copy to Karr, Cornell & Yeomans, Attys. for Pltf., Dec. 2, 1947. Edmund L. Smith, Clerk. [54]

[Title of District Court and Cause]

NOTICE OF APPEAL

You Will Please Take Notice that the plaintiff, Pacific Electric Railway Company, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from so much of the judgment of the above entitled action, entered September 5, 1947, as contained in paragraphs I, II and IV thereof by which it denies plaintiff full commercial rates on all shipments other than those mentioned in paragraphs III, V and VI of said judgment.

Dated this 4th day of December, 1947.

FRANK KARR
C. W. CORNELL
E. D. YEOMANS
By E. D. Yeomans
Attorneys for Plaintiff

[Endorsed]: Filed & mld. copy to Ronald Walker, Asst. U. S. Atty., Dec. 4, 1947. Edmund L. Smith, Clerk. [55]

[Title of District Court and Cause]

STIPULATION AND ORDER EXTENDING TIME TO DOCKET CAUSE ON APPEAL

It Is Hereby Stipulated by and between the parties hereto, by and through their respective attorneys, that the time within which to file the record and docket the appeals in the above entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit may be extended to and including the 16th day of February, 1948.

Dated this 9 day of January, 1948.

FRANK KARR
C. W. CORNELL
E. D. YEOMANS
By E. D. Yeomans
Attorneys for Plaintiff-Appellant

JAMES M. CARTER
United States Attorney
RONALD WALKER
Assistant U. S. Attorney
By Arline Martin
Attorneys for Defendant Appellant

It Is So Ordered.

Dated this 9 day of January, 1948.

PAUL J. McCORMICK
United States District Judge

[Endorsed]: Filed Jan. 9, 1948. Edmund L. Smith, Clerk. [56]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 60, inclusive, contain full, true and correct copies of Petition; Answer; Stipulation of Facts; Stipulation; Memorandum of Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal of Defendant; Notice of Appeal of Plaintiff; Stipulation and Order Extending Time to Docket Appeal; Stipulation Designating Contents of Record on Appeal and Defendant's Statement of Points on Appeal which, together with copy of Reporter's Transcript of Proceedings on October 30, 1946 and original Plaintiff's Exhibit No. 1 and Defendant's Exhibits A-1, A-2, A-3, A-4, A-5, B for identification and C for identification, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $7.60, one-half of which sum has been paid to me by the plaintiff-cross-appellant.

Witness my hand and the seal of said District Court this 27 day of January, A. D. 1948.

(Seal) EDMUND L. SMITH,
Clerk,

By Theodore Hocke,
Chief Deputy Clerk.

[Title of District Court and Cause]

Honorable William C. Mathes, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, October 30, 1946

Appearances:

For the Plaintiff: Frank Karr, Esquire, C. W. Cornell, Esquire, and E. D. Yeomans, Esquire.

For the Defendant: Hubert H. Margolies, Esquire, for Department of Justice; George F. Galland, Esquire, for Maritime Commission.

Los Angeles, California, October 30, 1946. 10:00 A. M.

(Case called by the clerk for trial.)

The Court: Are both sides ready, gentlemen?

Mr. Yeomans: Yes, your Honor; we are ready to proceed.

Mr. Margolies: Yes, sir.

Mr. Yeomans: I take it, of course, that there is not any necessity of reviewing in a general way the nature of the case because we have had it up a couple of times and we have filed briefs.

The Court: Yes; and I have read the briefs, Mr. Yeomans.

On this question of the burden of proof, it seems to me that there is nothing in the Statute which would take the burden away from the plaintiff, in view of the legislative history and even the formation of the Statute itself, which means that the plaintiff, in order to impose a

liability upon the Government, would have to have the burden of eliminating the suit from the military or naval category.

There may be a burden in certain instances upon the Government to come forward with evidence. Of course, under our New Rules that is not so important, because you can learn what the other fellow knows pretty well, anyhow.

Mr. Yeomans: We will be very glad to have you make a [2*] particular ruling on that question. I will mention that when we get to the point of arguing about the case particularly.

It is our position, of course, that the burden of proof question goes beyond the burden of coming forward; that it is a question of the burden of proving the issue.

But, as I say, when we get to argument I will mention that again. And we would like, though, in any event to have the court rule on the question, along with the broader issues, so that possibly we can get a final determination on that point which is important to us in the rest of our litigation on this subject.

Before getting into the argument, we have a few little evidentiary matters which we would like to get in to complete the record; and I think probably that we might as well proceed and get those into evidence, and then we can go ahead with our arguments.

The Court: I will rule at this time, Mr. Yeomans, that the burden of proof is upon the plaintiff. I notice

*Page number appearing at top of page of original Reporter's Transcript.

your petition does not plead around the exception to the Statute.

Mr. Yeomans: No; it does not.

The Court: In view of that ruling, you might want to amend.

Mr. Yeomans: No; we do not want to amend. We want [3] to have that issue squarely presented.

As I say, we are going to present argument on that question further, which has been presented since these memoranda—not in addition to that, but as a part of our argument, that is one of the points we wish to present, and possibly the court might reserve its ruling on that question and include it as a part of the decision in the case.

The Court: Yes; I would prefer to do that. I thought you wished me to make a ruling at this time.

Mr. Yeomans: Well, we did. We did wish to have it made well in advance of trial so we would be in a position to know, but since it has passed that stage and we are here at trial, it really becomes now a part of the case, because we have appeared to the extent to which the evidence is going to be offered, and then it is just a question of what conclusion the court is going to draw from that evidence.

The Court: Yes. As I recall, neither the petition filed by the plaintiff nor the answer of the defendant—the petition does not plead around the exception, and the answer of the defendant does not set up the exception as an affirmative defense.

Mr. Yeomans: We have taken the position, I think both the defendant and the plaintiff, that the pleadings have [4] become somewhat unimportant in view of the stipulation we have entered into.

The question was raised as to whether the defendant should amend its answer, and I think, clearly, the answer does not even present the issue. But they advised that in view of the stipulation of facts, that the stipulation itself states the issues; and we have really framed issues by the stipulation rather than by the petition and answer. In other words, the stipulation says if certain things are found to be true, the plaintiff is entitled to recover; if not, the plaintiff gets nothing.

Now, by that stipulation in that manner, it has been my impression, and I thought it was the defendant's impression, that we have by stipulation stated the issues for the court to determine.

The Court: I do not suppose there will be any question that the case is tried upon the assumption that the issues are framed as set forth in the stipulation. There won't be any pleading problem in the case, I should think.

Mr. Yeomans: I think that the defendant is as interested in getting a determination of these issues as the plaintiff is to dispose of the principal question rather than on mere technical rules of pleading.

The Court: The reason I raised the question, I had in [5] mind the appellate courts, not this court.

Mr. Yeomans: That is right.

The Court: As far as I am concerned, I think the issues are squarely here to be determined and that the stipulation, being a pre-trial document, is in effect a settlement of the issues.

Mr. Yeomans: I might ask the counsel for the defendant if that is his understanding, that the stipulation itself presents the issues that we are expecting to have determined, so there won't be any question. Or is there going to be some question as to the issues as raised by the petition and answer?

Mr. Margolies: During the summer this question came up, and we agreed with Mr. Yeomans that in view of the supersedence of the joinder of issues through the pleadings by the framing of the issues by the stipulation, there was no point to an amendment of the pleadings; that we felt we would have difficulty to file an amended answer. But we do think the issues were joined by the stipulation; that the stipulation presented the matter probably more residually and directly than the technical procedure of reaching issues through the filing of an amended petition and an amended answer.

The Court: Yes. But that state of the pleadings brings us back to the burden of proof problem. The plaintiff takes [6] the position that you can set up the exception to the Statute as a burden of proof on the defense, I suppose; and the defendant takes the position that the defendant should plead around the exception to the Statute.

Mr. Margolies: Your Honor will understand that if we were to set up the exception as affirmative defense, rather than through our general denial, it might be a case of invited error; and our position has been at the outset that it is plaintiff's duty to establish its right to recover, and that it cannot say that the burden of proof is upon the Government, or the affirmative is upon the Government to establish that this was not property of the United States.

Basically, the question relates to whether or not there were undercharges or overcharges, and plaintiff sues for a withholding.

The Court: Are you agreed, gentlemen, that the case will be tried now upon the issues as raised by the stipulation on file?

Mr. Yeomans: That is perfectly agreeable to the plaintiff.

Mr. Margolies: And likewise to the defendant.

The Court: Very well. Identify that stipulation.

Mr. Yeomans: There are two stipulations. The Stipulation of Facts is the one that we are referring to. [7] There is another stipulation.

The Court: This stipulation we are speaking of now is a "Stipulation of Facts" filed October 25, 1946, which is a document comprising 22 pages. There was a two-page stipulation filed on the same date with respect to the counterclaim.

Mr. Yeomans: That is correct.

The Court: Very well, gentlemen. The plaintiff may proceed.

Mr. Yeomans: And it is understood, then, that the stipulation is in evidence and, of course, may be considered as the evidence in the case or as introduced into evidence?

The Court: Yes.

Mr. Yeomans: There is one other phase of evidence that the plaintiff would like to offer. It is one of the contracts between the Maritime Commission and California Shipbuilding Corporation, being contract MCc-7785, dated March 14, 1941, which contract is referred to on page 2, line 4 of the Stipulation of Facts; and which contract contains, attached to it, a letter dated June 30, 1942 from E. S. Land, Chairman to California Shipbuilding Corporation, and an Addendum No. 1, dated March 19, 1941.

We would like to offer this contract into evidence as the plaintiff's first exhibit, whatever number.

The Court: Is there objection? [8]

Mr. Margolies: No, sir.

The Clerk: Plaintiff's Exhibit No. 1.

[Note: Plaintiff's Exhibit No. 1 will be found at page 84 of the Transcript of Record.]

The Court: The document will be received into evidence and marked Plaintiff's Exhibit No. 1, Mr. Clerk?

The Clerk: Yes, your Honor.

Mr. Yeomans: And it is understood that, although that is not an executed copy, the parties agree that it is a true and correct copy of the original document?

Mr. Margolies: That is agreed.

The Court: Is that correct?

Mr. Margolies: Yes.

The Court: Is this a typical contract?

Mr. Yeomans: That is what I was just going to next mention. That it is also stipulated by the parties that this contract is typical of the other contracts between the Maritime Commission and California Shipbuilding Corporation referred to in the Stipulation of Facts, except that possibly insofar as the Stipulation of Facts it has specifically references to differences between these contracts. Is that correct?

Mr. Margolies: Agreed to by defendant.

Mr. Yeomans: With that and the Stipulation of Facts the plaintiff rests.

The Court: Does the defendant have any further evidence? [9]

Mr. Margolies: We have some evidence.

There are three bills in this suit as to which the issue depends to some extent on whether the title was in the United States at the time of moving.

The Government wishes to introduce into evidence the five bills of lading which are in this exhibit; and they are General Accounting Office page C-15, which is bill of lading MC-88579; General Accounting Office page C-22, bill of lading MC-22992; General Accounting Office page C-27, bill of lading MC-19113; General Accounting Office page C-31, bill of lading MC-28270; and General Accounting Office page C-35, bill of lading MC-34759.

The General Accounting Office exhibit consists of pages C-1 to C-45, but we are introducing only the five papers that I have requested, namely, pages C-15, C-22, C-27, C-31, and C-35, which are the five bills of lading which are as to which the title to the property is disputed.

The Court: Is it possible to remove those?

Mr. Margolies: It is rather difficult to do. We would be very glad to do it so we would have it for further use.

Mr. Yeomans: I think we might as well tear off the Great Seal. I do not object to their being a true copy, and I have no objection to their admission as evidence.

The Court: As I understand, it is correct, then, to [10] refer to these documents which you offer, as bills of lading covering the shipments as to which the plaintiff contends the Government did not have title at the time the shipments were consigned?

Mr. Margolies: That is true. There are three carrier bills involving six contracts and five bills of lading, and we are introducing only five bills of lading.

The Court: Is that a correct statement, Mr. Yeomans?

Mr. Yeomans: That is a correct statement. And we have no objection that the copies offered by the defendant are true and correct copies of the original bills.

The Court: In view of Mr. Yeoman's suggestion, I would suggest you just detach the ones you are offering and we will mark them Defendant's Exhibits A—how many are there?

Mr. Margolies: There are five, five bills of lading and I have read their numbers.

Mr. Galland: Read me the pages.

Mr. Margolies: C-15.

The Court: Let that one be marked Defendant's Exhibit A-1. Identify it in the record.

Mr. Margolies: Defendant's Exhibit A-1 is bill of lading MC-88579. Next, we have bill of lading MC-22992.

The Court: That will be marked Defendant's Exhibit A-2.

Mr. Margolies: Bill of lading No. MC-19113. [11]

The Court: That will be marked Defendant's Exhibit A-3.

Mr. Margolies: Bill of lading MC-28270.

The Court: That will be marked Defendant's Exhibit A-4.

Mr. Margolies: And bill of lading No. MC-34759.

The Court: That will be marked Defendant's Exhibit A-5. Does that complete them?

Mr. Margolies: We have two other matters, both resolutions of the Maritime Commission.

The Court: That completes the bills of lading?

Mr. Margolies: That completes the five bills of lading.

The Court: Any objection to the receipt into evidence of Defendant's Exhibit A-1 to A-5, inclusive?

Mr. Yeomans: No objection.

The Court: They will be received into evidence.

Date
Date 12/30/46 A1
Clerk, U. S. District Court, Sou. Dist. of Calif
Deputy Clerk

MC- 88579
21626

Standard Form No. 1058
Form Approved by Comptroller General U. S.
August 24, 1928

RECEIVED DEC 9 A
GENERAL SHIPPING

SEE REVERSE HEREOF

UNITED STATES OF AMERICA

U. S. MARITIME COMMISSION

(Department or Establishment and Bureau or Service)

(Appropriation chargeable)

DIVISION OF PURCHASE AND SUPPLY

(Issuing office)

F. E. HICKEY, Director

(Name and title of issuing officer)

November 25, 1941

(Date issued)

GOVERNMENT BILL OF LADING

ORIGINAL

Received from Inland Steel Company- Indiana Harbor Works.
(Consignor)

by the Indiana Harbor Belt Railroad Company. the public property hereinafter described,
(Name of transportation company)

in apparent good order and condition (contents and value unknown), to be forwarded subject to conditions stated on the reverse hereof, from Indiana Harbor, Indiana (Shipping point) to Terminal Island- Los Angeles Harbor California (Destination)

by the said company and connecting lines, there to be delivered in like good order and condition to
(Consignee)

United States Maritime Commission AT: California Shipbuilding Corporation

via I.H.B.- CRIP - Southern Pacific RR c/o Pacific Electric Ry
(Route journey only when some substantial interest of the Government is subserved thereby)

MARKS	NUMBERS ON PACKAGES	NUMBER AND KIND OF PACKAGES	DESCRIPTION OF ARTICLES (Observe strictly carrier's freight classification. Avoid trade or technical names)	WEIGHTS*
			Steel Plates. for USMC Design EC-8	SC-1

Mr. Galland: Read me the pages.

Mr. Margolies: C-15.

The Court: Let that one be marked Defendant's Exhibit A-1. Identify it in the record.

Mr. Margolies: Defendant's Exhibit A-1 is bill of lading MC-88579. Next, we have bill of lading MC-22992.

The Court: That will be marked Defendant's Exhibit A-2.

Mr. Margolies: Bill of lading No. MC-19113. [11]

The Court: That will be marked Defendant's Exhibit A-3.

Mr. Margolies: Bill of lading MC-28270.

The Court: That will be marked Defendant's Exhibit A-4.

Mr. Margolies: And bill of lading No. MC-34759.

The Court: That will be marked Defendant's Exhibit A-5. Does that complete them?

Mr. Margolies: We have two other matters, both resolutions of the Maritime Commission.

The Court: That completes the bills of lading?

Mr. Margolies: That completes the five bills of lading.

The Court: Any objection to the receipt into evidence of Defendant's Exhibit A-1 to A-5, inclusive?

Mr. Yeomans: No objection.

The Court: They will be received into evidence.

Case No. [illegible] vs. [illegible]
Date 12/10/46
Clerk, U. S. D. C. [illegible] Dist. of Cal.
Deputy Clerk

MC- 88579
21626

Standard Form No. 1058
Form Approved by Comptroller General U. S.
August 24, 1928

RECEIVED DEC 9 AM
GENERAL SHIPPING

SEE REVERSE HEREOF

UNITED STATES OF AMERICA
U. S. MARITIME COMMISSION

(Department or Establishment and Bureau or Service)

(Appropriation chargeable)

DIVISION OF PURCHASE AND SUPPLY

GOVERNMENT BILL OF LADING
ORIGINAL

F. E. HICKEY, Director (Name and title of issuing officer) (Issuing office) November 2, 1941 (Date issued)

Received from Inland Steel Company- Indiana Harbor Works. (Consignor)
by the Indiana Harbor Belt Railroad Company. (Name of transportation company) the public property hereinafter described, in apparent good order and condition (contents and value unknown), to be forwarded subject to conditions stated on the reverse hereof, from Indiana Harbor, Indiana (Shipping point) to Terminal Island- Los Angeles Harbor California (Destination)
by the said company and connecting lines, there to be delivered in like good order and condition to United States Maritime Commission AT: California Shipbuilding Corporation (Consignee)
via IHB- CRIP - Southern Pacific RR c/o Pacific Electric Ry
(Route journey only when some substantial interest of the Government is subserved thereby)

MARKS	NUMBERS ON PACKAGES	NUMBER AND KIND OF PACKAGES	DESCRIPTION OF ARTICLES (Observe strictly carrier's freight classification. Avoid trade or technical names)	WEIGHTS*
		Steel Plates. for	USMC Design EC-2	SC-1
		623 Pcs		66,130#
		CIAW Bureau weight agreement No 4517		
		Inland Steel B/L 64152- Issued 12-9-41		

Pick-up service at origin was / was not by the Government. (Signature of Consignor)

†Size car ordered ____ ft. Size car furnished ____ ft. Date furnished ____ Initials P&LE Car No. 46541

TARIFF AUTHORITY
(To be filled in by general office rendering account)

AUTHORITY FOR SHIPMENT
Route order No. MC- 2071

Indiana Harbor Belt Railroad Company. (Name of transportation company)
12-9- 1941 (Date) [signature] (Agent)

CERTIFICATE OF ISSUING OFFICER
(To be filled out when this bill of lading is issued for use by contractor in making shipment)

Contract No. MCc(ESP)1520, or Purchase Order No. ____, dated August 12th, 1941
Indiana Harbor, Indiana - Frt. Allowed CCA
(F. O. B. point named in contract)
[signature] (Issuing officer) for E. T. Dillon, Administrative Assistant
(CARRIER'S RIGHTS TO SHIPPING CHARGES NOT AFFECTED BY FACTS SET OUT IN THIS CERTIFICATE)

RECEIVED

CONSIGNEE'S CERTIFICATE OF DELIVERY

I have this day received from Pacific Electric Railway (Name of transportation company)
at Terminal Island, Los Angeles Harbor, Calif. (Actual point of delivery by carrier) the public property described in this bill of lading, in apparent good order and condition, except as noted on the reverse hereof. Delivery service at destination was / was not by the Government.
Weight Sixty-six Thousand, One Hundred and Thirty Pounds (In words) pounds. 66,130# (In figures)
CALIFORNIA SHIPBUILDING CORPORATION [signature] (Consignee) Traffic Manager
DEC 29 1941, 19__ (Date)

*Show also cubic measurement for shipments via ocean carrier in [illegible]
INSTRUCTIONS FOR BILLING: 1. Consignee should pay [illegible] 2. Charges to be billed to the Department or Establishment and Bureau or Service named above on authorized Government voucher form, [illegible] supporting paper.

†Furnish this information in case of carload shipments only.

C-15

PATENTED

Mr. Galland: Read me the pages.

Mr. Margolies: C-15.

The Court: Let that one be marked Defendant's Exhibit A-1. Identify it in the record.

Mr. Margolies: Defendant's Exhibit A-1 is bill of lading MC-88579. Next, we have bill of lading MC-22992.

The Court: That will be marked Defendant's Exhibit A-2.

Mr. Margolies: Bill of lading No. MC-19113. [11]

The Court: That will be marked Defendant's Exhibit A-3.

Mr. Margolies: Bill of lading MC-28270.

The Court: That will be marked Defendant's Exhibit A-4.

Mr. Margolies: And bill of lading No. MC-34759.

The Court: That will be marked Defendant's Exhibit A-5. Does that complete them?

Mr. Margolies: We have two other matters, both resolutions of the Maritime Commission.

The Court: That completes the bills of lading?

Mr. Margolies: That completes the five bills of lading.

The Court: Any objection to the receipt into evidence of Defendant's Exhibit A-1 to A-5, inclusive?

Mr. Yeomans: No objection.

The Court: They will be received into evidence.

RECEIVED AT
JAN 9 1942

MC-22992

Standard Form No. 1058
Prescribed by Treasury Department
Office of the Quartermaster General
August 24, 1928

UNITED STATES OF AMERICA
21888

Bill to U. S. MARITIME COMMISSION
(Department or Establishment and Bureau or Service)

SEE REVERSE HEREOF

EMERGENCY SHIP CONSTRUCTION FUND, U.S.M.C.
(Appropriation chargeable)

DIVISION OF PURCHASE AND SUPPLY
(Issuing office)

GOVERNMENT BILL OF LADING

F. E. HICKEY, Director, October 3, 1941
(Name and title of issuing officer) (Date issued)

ORIGINAL

Received from CARNEGIE ILLINOIS STEEL CORPN
(Consignor)

by the BESSEMER & LAKE ERIE RAILROAD the public property hereinafter described,
(Name of transportation company)

in apparent good order and condition (contents and value unknown), to be forwarded subject to condition stated on the reverse hereof, from MUNHALL PA to LOS ANGELES HARBOR CALIF
(Shipping point) (Destination)

by the said company and connecting lines, there to be delivered in like good order and condition to CALIFORNIA
(Consignee)

SHIPBUILDING CORPN TERMINAL ISLAND

via URR & B&LE & NYC&STL & GW&O & SP & PE
(Route journey only when some substantial interest of the Government is subserved thereby)

MARKS	NUMBERS ON PACKAGES	NUMBER AND KIND OF PACKAGES	DESCRIPTION OF ARTICLES (Observe strictly carrier's freight classification. Avoid trade or technical names)	WEIGHTS*
		60	STEEL ANGLES	40 584
		3	STEEL CHANNELS	

Pick-up service at origin was / was not by the Government.

(Signature of Consignor) 40-0-65089-90 12-29-41

Size of car ordered ft. Size car furnished ft. Date furnished Initials B&LE Car No. 36328

TARIFF AUTHORITY
(To be filled in by general office rendering account)

Bessemer and Lake Erie Railroad Company.
(Name of transportation company)

AUTHORITY FOR SHIPMENT
Route Order No. MC-509

DEC 31 1941, 19
(Date)

(Agent)

CERTIFICATE OF ISSUING OFFICER
(To be filled out when this bill of lading is issued by an officer in making shipment)

Contract No. Munhall Purchase Order No. MCC-ESP-1145 dated 5-20-41, 19

LOS ANGELES HARBOR CALIF Freight allowed
(F. O. B. point named in contract)

MLS

for E. T. Dillon, Administrative Assistant
(Issuing officer)

CARRIER'S RIGHTS TO SHIPPING CHARGES NOT AFFECTED BY FACTS SET OUT IN THIS CERTIFICATE)

CONSIGNEE'S CERTIFICATE OF DELIVERY

I have this day received from Pacific Electric Railway
(Name of transportation company)

at Terminal Island, Los Angeles Harbor, Calif. the public property described in this bill of lading, in apparent
(Actual point of delivery by carrier)

good order and condition, except as noted on the reverse hereof. Delivery service at destination was not by the Government.

Weight Forty Thousand, Five Hundred and Eighty-Four pounds. 40,584
(In words) (In figures)

CALIFORNIA SHIPBUILDING CORPORATION
(Consignee) By Traffic Manager
JAN 23 1942, 19
(Date)

*Where rate is dependent on minimum or maximum weights, show actual weight. INSTRUCTIONS FOR BILLING: 1. Consignee should pay no charges on this shipment. 2. Charges to be billed to the Department or Establishment and Bureau or Service named thereon. 3. Furnish this information in case of carload shipments only.

C-22

Mr. Galland: Read me the pages.

Mr. Margolies: C-15.

The Court: Let that one be marked Defendant's Exhibit A-1. Identify it in the record.

Mr. Margolies: Defendant's Exhibit A-1 is bill of lading MC-88579. Next, we have bill of lading MC-22992.

The Court: That will be marked Defendant's Exhibit A-2.

Mr. Margolies: Bill of lading No. MC-19113. [11]

The Court: That will be marked Defendant's Exhibit A-3.

Mr. Margolies: Bill of lading MC-28270.

The Court: That will be marked Defendant's Exhibit A-4.

Mr. Margolies: And bill of lading No. MC-34759.

The Court: That will be marked Defendant's Exhibit A-5. Does that complete them?

Mr. Margolies: We have two other matters, both resolutions of the Maritime Commission.

The Court: That completes the bills of lading?

Mr. Margolies: That completes the five bills of lading.

The Court: Any objection to the receipt into evidence of Defendant's Exhibit A-1 to A-5, inclusive?

Mr. Yeomans: No objection.

The Court: They will be received into evidence.

Standard Form No. 1058
Prescribed by Director of Traffic, Office of the Chief Quartermaster, Army Service Forces
Authority: Par. 1058

SM-212

UNITED STATES OF AMERICA

MC-19113

21892

Bill to U. S. MARITIME COMMISSION
(Department or Establishment and Bureau or Service)
EMERGENCY SHIP CONSTRUCTION FUND, U.S.M.C.
(Appropriation chargeable)
DIVISION OF PURCHASE AND SUPPLY
(Issuing office)

SEE REVERSE MEMO

GOVERNMENT BILL OF LADING

ORIGINAL

F. E. HICKEY, Director
(Name and title of issuing officer)
September 19, 1941
(Date issued)

Received from Jones & Laughlin Steel Corporation
(Consignor)
by the Pennsylvania Railroad Company
(Name of transportation company)
the public property hereinafter described, in apparent good order and condition (contents and value unknown), to be forwarded subject to condition stated on the reverse hereof, from Pittsburgh, Pennsylvania
(Shipping point)
to Terminal Island
Los Angeles Harbor, California
(Destination)
by the said company and connecting lines, there to be delivered in like good order and condition to California Shipbuilding Corporation.
(Consignee)

via PRR - MKT - SP - PE
(Route journey only when some substantial interest of the Government is subserved thereby)

127

MARKS	NUMBERS ON PACKAGES	NUMBER AND KIND OF PACKAGES	DESCRIPTION OF ARTICLES (Observe strictly carrier's freight classification. Avoid trade or technical names)	WEIGHTS*
PRR 807383 100 Con		44 Pcs.	Steel Plates	122320#
		MCC (ESP) 1016	21 Pcs. 66270#	
		MCC (ESP) 1083	23 Pcs. 56050#	

17 pieces

Pick-up service at origin was / was not by the Government.
(Signature of Consignor)

Size of car ordered ft. Size car furnished ft. Date furnished Initials Car No.

TARIFF AUTHORITY
(To be filled in by general office rendering account)

AUTHORITY FOR SHIPMENT
MC-2722

Penna RR Co
(Name of transportation company)
9/16, 1941 Par
(Date) (Agent)

CERTIFICATE OF ISSUING OFFICER
(To be filled out when this bill of lading is [illegible] or Purchase Order No. MC-(SP) 1083, dated 8-12-41, 19
Contract No. accepted by contractor is mailed herewith
(P. O. or point called for original)
Pittsburgh, Pa. - Freight Agent
for F. T. Dillon
(Issuing officer)
Administrative Assistant

(CARRIER'S RIGHTS TO SHIPPING CHARGES NOT AFFECTED BY FACTS SET FORTH IN THIS CERTIFICATE)

CONSIGNEE'S CERTIFICATE OF DELIVERY

I have this day received from Pacific Electric Railway
(Name of transportation company)
at Terminal Island, Los Angeles Harbor, Calif., the public property described in this bill of lading, in apparent good order and condition, except as noted on the reverse hereof. Delivery service at destination was not by the Government.
(Actual point of delivery by carrier)
Weight One Hundred Twenty-Two Thousand, Three Hundred and Twenty pounds. 122,320
(In figures)

CALIFORNIA SHIPBUILDING CORPORATION
(Consignee)
Traffic Manager
JAN 2 3 1942, 19
(Title) (Date)

Where also right reconsignment for shipments via ocean carrier to points where required
INSTRUCTIONS FOR FILLING: 1. Consignee should pay no charges on this shipment. 2. Charges to be billed to the Department or Establishment and Bureau or Service named
Notes to authorized Government voucher form, attaching this bill of lading as supporting paper. 3. Furnish this information in case of railroad shipments only.
PATENTS

C-27

Mr. Galland: Read me the pages.

Mr. Margolies: C-15.

The Court: Let that one be marked Defendant's Exhibit A-1. Identify it in the record.

Mr. Margolies: Defendant's Exhibit A-1 is bill of lading MC-88579. Next, we have bill of lading MC-22992.

The Court: That will be marked Defendant's Exhibit A-2.

Mr. Margolies: Bill of lading No. MC-19113. [11]

The Court: That will be marked Defendant's Exhibit A-3.

Mr. Margolies: Bill of lading MC-28270.

The Court: That will be marked Defendant's Exhibit A-4.

Mr. Margolies: And bill of lading No. MC-34759.

The Court: That will be marked Defendant's Exhibit A-5. Does that complete them?

Mr. Margolies: We have two other matters, both resolutions of the Maritime Commission.

The Court: That completes the bills of lading?

Mr. Margolies: That completes the five bills of lading.

The Court: Any objection to the receipt into evidence of Defendant's Exhibit A-1 to A-5, inclusive?

Mr. Yeomans: No objection.

The Court: They will be received into evidence.

Case No. ... Claim No. ...
Date ... Docket No. ...
Date 12/21/44 Ar-4 to 1410 C.S.
Clerk, U.S. Customs Court, San Dist. of Calif.
Deputy Clerk.

MC-28270

Standard Form No. 1058
Approved by Treasury Department and U. S. Maritime Commission
August 24, 1940

UNITED STATES OF AMERICA

21746 RECEIVED AT

Bill to U. S. MARITIME COMMISSION
(Department or Establishment and Bureau or Service)
EMERGENCY SHIP CONSTRUCTION
(Appropriation chargeable)
DIVISION OF PURCHASE AND SUPPLY
(Issuing office)

SEE REVERSE HEREOF

CALIFORNIA SHIP BUILDING CORP.

GOVERNMENT BILL OF LADING

ORIGINAL

F. E. HICKEY, Director
(Name and title of issuing officer)

Date issued October 23, 1941

Received from THE OTIS STEEL CO., CLEVELAND WORKS
(Consignor)

by the WHEELING & LAKE ERIE RY. CO. the public property hereinafter described,
(Name of transportation company)

in apparent good order and condition (contents and value unknown), to be forwarded subject to condition stated on the reverse hereof, from CLEVELAND, OHIO to TERMINAL ISLAND, LOS ANGELES HARBOR, CALIFORNIA
(Shipping point) (Destination)

by the said company and connecting lines, there to be delivered in like good order and condition to CALIFORNIA SHIPBUILDING CO., TERMINAL ISLAND, LOS ANGELES HARBOR, CALIFORNIA
(Consignee)

via WLE NYC STL CRIAP SPA PACIFIC ELECT.
(Route journey only when some substantial interest of the Government is subserved thereby)

MARKS	NUMBERS ON PACKAGES	NUMBER AND KIND OF PACKAGES	DESCRIPTION OF ARTICLES (Observe strictly carrier's freight classification. Avoid trade or technical names)	WEIGHTS*
		176	STEEL PLATES DUNNAGE 500#	82680

Pick-up service at origin XX was not by the Government. OTIS STEEL CO. SHIPPER
(Signature of Consignor)

Size of car ordered ... ft. Size car furnished ... ft. Date furnished / Initials P.R.R. Car No. 781840

TARIFF AUTHORITY
(To be filled in by general office rendering account)

AUTHORITY FOR SHIPMENT
AGENT C.D.S. NO. 1C- 4600

Wheeling & Lake Erie Ry Co
(Name of transportation company)
12-2/ 1944 Per E. D. Shenk, Agt.
(Date) (Agent)

CERTIFICATE OF ISSUING OFFICER
(To be filled out when date of billing is limited for use by contractor in making shipment)

Contract No. MCC(ESP)1837, or Purchase Order No. ... dated SEPT 8, 1941

CLEVELAND, OHIO
(F. O. B. point named in contract)

(CARRIER'S RIGHTS TO SHIPPING CHARGES NOT AFFECTED BY FACTS SET OUT IN THIS CERTIFICATE)

CONSIGNEE'S CERTIFICATE OF DELIVERY

I have this day received from Pacific Electric Railway
(Name of transportation company)

at Terminal Island, Los Angeles Harbor, Calif. the public property described in this bill of lading, in apparent good order and condition, except as noted on the reverse hereof. Delivery service at destination was not by the Government.
(Actual point of delivery by carrier)

Weight Eighty-Two Thousand, Six Hundred and Eighty pounds. 82,680 lbs.
(In figures)

CALIFORNIA SHIPBUILDING CORPORATION
(Consignee) Traffic Manager
JAN - 6 1942, 19
(Date)

Show gross (not tare) measurement for shipments via ocean carrier in cases where required.
INSTRUCTIONS FOR BILLING: 1. Consignee should pay no charges on this shipment. 2. Charges to be billed to the Department or Establishment and Bureau or Service named above on authorized Government voucher form, attaching this bill of lading as supporting paper.
(Permits this information in case of carload shipments only)

PATENTED

C-31

Mr. Galland: Read me the pages.

Mr. Margolies: C-15.

The Court: Let that one be marked Defendant's Exhibit A-1. Identify it in the record.

Mr. Margolies: Defendant's Exhibit A-1 is bill of lading MC-88579. Next, we have bill of lading MC-22992.

The Court: That will be marked Defendant's Exhibit A-2.

Mr. Margolies: Bill of lading No. MC-19113. [11]

The Court: That will be marked Defendant's Exhibit A-3.

Mr. Margolies: Bill of lading MC-28270.

The Court: That will be marked Defendant's Exhibit A-4.

Mr. Margolies: And bill of lading No. MC-34759.

The Court: That will be marked Defendant's Exhibit A-5. Does that complete them?

Mr. Margolies: We have two other matters, both resolutions of the Maritime Commission.

The Court: That completes the bills of lading?

Mr. Margolies: That completes the five bills of lading.

The Court: Any objection to the receipt into evidence of Defendant's Exhibit A-1 to A-5, inclusive?

Mr. Yeomans: No objection.

The Court: They will be received into evidence.

Date ... Filed ...
Clerk, U. S. D. C. ... Deputy Clerk

MC-34759

UNITED STATES OF AMERICA

21761

Bill to U. S. MARITIME COMMISSION
(Department or Establishment and Bureau or Service)

SEE REVERSE HEREOF

(Appropriation chargeable)
DIVISION OF PURCHASE AND SUPPLY
(Issuing office)

GOVERNMENT BILL OF LADING

F. E. HICKEY, Director — December 11, 1941
(Name and title of issuing officer) (Date issued)

ORIGINAL

Received from Youngstown Sheet & Tube Company
(Consignor)

by the B&O the public property hereinafter described,
(Name of transportation company)

in apparent good order and condition (contents and value unknown), to be forwarded subject to condition stated on the reverse hereof, from Youngstown, Ohio to Los Angeles Harbor, Calif.
(Shipping point) (Destination)

to the said company and connecting lines, there to be delivered in like good order and condition to United States Maritime Commission % California Shipbuilding Corp., Terminal Island
(Consignee)

Via B&O % CRIAP % SOU PAC % Pacific Elec. Ry.
(Route journey only when some substantial interest of the Government is subserved thereby)

MARKS	NUMBERS ON PACKAGES	NUMBER AND KIND OF PACKAGES	DESCRIPTION OF ARTICLES (Observe strictly carrier's freight classification. Avoid trade or technical names)	WEIGHTS*
		165 pcs.	Steel Sheets Car Seals - 590099 590100	206904

RECEIVED
U. S. MARITIME COMMISSION
DEC 2 1941
INSPECTION SECTION
TERMINAL ISLAND

Pick-up service at origin was not by the Government.
(Signature of Consignor)

Size of car ordered 40'6" Size car furnished 40'6" Date furnished 12/22 Initials PRR Car No. 64940

TARIFF AUTHORITY
(To be filled in by general office rendering account)

AUTHORITY FOR SHIPMENT
ROUTE ORDER NO. [illegible] MS-7042

The Baltimore & Ohio Railroad Company.
(Name of transportation company)

12/26, 1941 Per [illegible]
(Date) (Agent)

CERTIFICATE OF ISSUING OFFICER
(To be filled out when this bill of lading is issued by person or contractor in making shipment)

Contract No. , or Purchase Order No. MC(MSP)2690, dated 11/27/41, 19

Youngstown, Ohio
(P. O. B. point named in contract)

for E. T. Dillon, Administrative Assistant
(CARRIER'S RIGHTS TO SHIPPING CHARGES NOT AFFECTED BY FACTS SET OUT IN THIS CERTIFICATE)

CONSIGNEE'S CERTIFICATE OF DELIVERY

I have this day received from Pacific Electric Railway
(Name of transportation company)

at terminal Island, Los Angeles Harbor, Calif. the public property described in this bill of lading, in apparent
(Actual point of delivery by carrier)

good order and condition, except as noted on the reverse hereof. Delivery service at destination was not by the Government.

Weight Twenty Thousand, Six Hundred and Ninety pounds. 20,690

CALIFORNIA SHIPBUILDING CORPORATION [signature] JAN - 8 1942, 19
(Consignee) Traffic Manager (Date)

*Where rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ... per ...

(Penalties for false information in case of carload shipments only. Shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ... per ...)

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ... per ...

IMPORTANT—See reverse side for conditions. 1. Consignee should pay no charges on this shipment. 2. Charges to be billed to the Department or Establishment and Bureau or Service named hereon on authorized Government voucher form, attaching this bill of lading or supporting paper.

C-35

Mr. Margolies: Defendant has two copies of resolutions passed by the Maritime Commission. The first is dated December 4, 1942 and recites the resolution by the Maritime Commission that property after December 7, 1941 was military property for the United States moving for military or naval, and not for civil use; and reciting that theretofore there was no basis—

Mr. Yeomans: I do not care to interrupt. I take it [12] that you are not offering evidence now while you are counsel. Of course, as to those, we are going to object to these—not as to the fact that these resolutions were passed and that these are correct copies, but we are going to object to the admissibility of these resolutions. Not meaning to interrupt counsel.

The Court: As being incompetent?

Mr. Yeomans: Incompetent, irrelevant and immaterial, conclusions of the agent of the defendant.

The Court: You have identified it sufficiently, Mr. Margolies. Will you hand it to the clerk?

Mr. Yeomans: And if it is offered, I would like to formally make that objection, that the resolution is incompetent, irrelevant and immaterial; it is a conclusion of the party as to a matter which is at issue in the case.

The Court: There is no objection to the foundation?

Mr. Yeomans: No objection at all to the foundation.

The Court: Where does the date appear?

Mr. Margolies: The date does not appear, but counsel will not contest that it was passed as of December 4, 1942. He has seen the copy before and we noticed the oversight.

Mr. Yeomans: Yes. I will stipulate that the resolution offered was of that date passed by the Maritime Commission, and that represents a true copy of what was

passed. But we object to its introduction into evidence [13] for the reasons I have stated.

Mr. Galland: May I interrupt for just a moment? I think it had better be understood that it was passed on December 4th, rather than as of December 4th.

Mr. Yeomans: Passed on December 4th. That is what I meant to say.

The Court: Passed on December 4, 1942, and you make that stipulation subject to your objection.

Mr. Yeomans: That is correct. This involves a matter of some legal argument, which possibly, if it is agreeable, might be reserved for the determination after we have argued on that point. The defendant has cited a number of cases and I would like to go through and refer to some of those cases that have been cited in support of the effect of this document, and possibly the thing that would be advisable would be to reserve ruling on these matters until the court has heard us on that question.

The Court: Very well. The resolution of December 4, 1942 will be marked at this time Defendant's Exhibit B for identification, and the court will reserve ruling on the offer into evidence of Defendant's Exhibit B for identification.

[DEFENDANT'S EXHIBIT B IDENTIFICATION]

UNITED STATES [Crest] OF AMERICA
UNITED STATES MARITIME COMMISSION

Washington, May 3, 1946

I hereby certify that the annexed Resolution is a true and correct copy of a Resolution, the original of which is on file in the United States Maritime Commission.

(Defendant's Exhibit B Identification)

In Witness Whereof, I have hereunto set my hand, and caused the seal of the United States Maritime Commission to be affixed, on the day and year first above written.

(Seal) [Illegible]

Assistant Secretary United States Maritime Commission.

RESOLUTION

Whereas, pursuant to the provisions of the Merchant Marine Act, 1936, as amended, and acts subsequent and supplemental thereto, funds have been made available to the Commission for the construction of merchant vessels of such types, size and speed as the Commission may determine to be useful for carrying on the commerce of the United States and suitable for conversion into naval or military auxiliaries;

Whereas, the Commission, in carrying out the foregoing purposes, has procured and is procuring, either directly or through its agents and contractors, materials, equipment and supplies for use in the construction of such vessels on the basis of contracts or orders providing for passage of title and delivery to the Commission to such material, equipment and supplies at the point of manufacture thereof;

Whereas, by Section 321, Part II, Title III of the Transportation Act of 1940, approved September 18, 1940, (Public No. 785, 76th Cong., 3d Session) land-grant deductions with regard to the transportation of Government property were abolished except with regard to the transportation of military or naval property of the United States moving for military or naval and not for civil use,

(Defendant's Exhibit B Identification)

and to the transportation of members of the military or naval forces of the United States (or property of such members) when such members are traveling on official duty;

Whereas, prior to the entry of the United States into the present war on December 8, 1941, there was no basis for a determination by the Commission as of the time of transportation of any such materials, equipment and supplies that upon completion any particular vessel or group of vessels would be devoted primarily to the purposes of war rather than to the purposes of commerce; and

Whereas, subsequent to said date of December 8, 1941, it became apparent that all merchant vessels then in the process of construction and thereafter to be constructed until the termination of the present war were to be devoted primarily to the purposes of war, rather than to the purposes of commerce, for the transportation of munitions and supplies for direct consumption by military and naval forces in the various theatres of war, and for the transportation of military and naval personnel to and from said theatres of war.

Now, Therefore, Be It Resolved That:

1. The Commission hereby finds and determines that, as of December 8, 1941, all vessels then in the process of construction and thereafter to be constructed were to be devoted primarily to the purposes of war rather than to the purposes of commerce, and that all materials, equipment and supplies purchased by the Commission, its agents

(Defendant's Exhibit B Identification)

and contractors for incorporation in the construction of such vessels were, upon passage of title to the Government after said date of December 8, 1941, military or naval property of the United States and upon shipment moved for military or naval and not for civil use;

2. The proper officers of the Commission be authorized and directed to take any and all actions necessary and proper to obtain the benefit of land-grant freight rates wherever applicable in accordance with the provisions of Part II, Title III, Section 321 of the Transportation Act of 1940, on the basis of the action of the commission as herein set forth.

Case No. 4256. Pacific Electric vs. U. S. Deft's Exhibit. Date 10/30/46. No. B Identification. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

Mr. Margolies: We have likewise a resolution adopted by the United States Maritime Commission on July 2, 1946, with which plaintiff's counsel is familiar; and I take it [14] that after inspecting it, your Honor will wish to make the same ruling.

Mr. Yeomans: I would make the same offer as to its foundation and the same objection as to its admissibility.

The Court: Very well. Let it be marked Defendant's Exhibit C for identification at this time, and the court will reserve ruling upon its admissibility.

[DEFENDANT'S EXHIBIT C IDENTIFICATION]

RESOLUTION ADOPTED BY U. S. MARITIME COMMISSION ON JULY 2, 1946

Whereas, on December 4, 1942, the Commission adopted a resolution determining that, as of December 8, 1941, all vessels then in the process of construction or thereafter to be constructed were to be devoted primarily to the purposes of war rather than to the purposes of commerce, and that all materials, equipment and supplies purchased by the Commission, its agents and contractors, for incorporation in the construction of such vessels were, upon passage of title to the Government after December 8, 1941, military or naval property of the United States, etc.; and directing its officers to take all action necessary and proper to obtain the benefit of land grant freight rates in accordance with Part II, Title III, Section 321, of the Transportation Act of 1940; and

Whereas, upon the surrender of Japan on September 1, 1945, the Commission's shipbuilding program ceased to have a military purpose as its main objective;

Now, Therefore, Be It Resolved That:

1. The Commission hereby determines that the circumstances set forth in its aforesaid Resolution of December 4, 1942, are no longer in effect;

2. After September 1, 1945, the date of the formal surrender of Japan, the primary purpose of the ship construction program of the Commission ceased to be military;

3. Property purchased by the Maritime Commission when shipped after September 1, 1945, should not be re-

(Defendant's Exhibit C Identification)

garded as military or naval property of the United States moving for military use, within the meaning of Part II, Title III, Section 321 of the Transportation Act of 1940.

4. The Commission will not claim land grant rates on the movement of any of its property shipped after September 1, 1945.

Case No. 4256 WM-Civ. Pacific Electric vs. U. S. Deft's Exhibit. Date 10/30/46. No. C Identification. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

Mr. Margolies: We would like to point out that, as the agency in interest, it was incumbent upon the Maritime Commission to classify materials and to specify on the bills of lading on which the shipments moved whether they were military or naval property; so that this was not anything done outside the course of business, but it fell within the line of duty of the Maritime Commission in having transported for its use the property which I have stated over the railroads of the country.

Mr. Yeomans: I would like to wait and present whatever argument we have on that question as a part of our argument.

The Court: Is there any contention that these resolutions were brought home to the plaintiff here; that the plaintiff had knowledge of them before the shipments?

Mr. Margolies: May I say that they are published rulings of the General Accounting Office, and in August of 1941 the Maritime Commission had requested a ruling of the General Accounting Office as to whether property shipped [15] under its programs were military and naval property of the United States.

There is a published opinion of the General Accounting Office stating that in August of 1941, that that was a matter to be decided by the Maritime Commission in the administration of its various programs.

That undoubtedly was brought home to the carriers, who were extremely sensitive to rulings of the General Accounting Office as to transportation matters.

The Court: Does the defendant contend here that the plaintiff had notice of these resolutions prior to undertaking the shipments that are involved here in this case; and if so, how is that notice brought home? Is there any basis upon which legally to charge the plaintiff with knowledge of the contents of these resolutions?

Mr. Margolies: As we see it, it is not so much a matter of whether they were on notice, but as to whether this was not administrative action taken—

The Court: Yes; I appreciate that. I just wondered if the Government was making the other contention, that the defendant knew or was legally charged with knowledge of the action taken prior to accepting the shipments, laying aside for the moment your contention that this represents an administrative interpretation and an administrative action in the course of duty charged by law. [16]

Mr. Margolies: The General Accounting Office ruling is in Volume 20 of Opinions of the General Accounting Office, that the carriers knew that the Maritime Commission shipments were going to move at what the Government contended were land grant rates.

The Court: Were these rulings published in Federal Register?

Mr. Yeomans: I might say that if counsel is agreeable, I have a copy of the Comptroller General's opinion—it has been referred to—which I would like to offer the

court for the court's information in connection with this. It is an opinion by the Comptroller General on this very issue we have in this case and, although we do not agree with it, the court might be interested in reading it.

The Court: Yes; I would be glad to have you.

Mr. Yeomans: It is a copy, but I think it is sufficient. It is quite lengthy.

The Court: That is Opinion No. B-19374, published in 21 Comptroller General's Opinions 137, opinion dated August 15, 1941. Is there any objection to marking this as a plaintiff's exhibit?

Mr. Yeomans: I do not offer it as an exhibit in evidence. It is merely an opinion, just like a published opinion of the Comptroller General.

The Court: The only thought I had, it might be well [17] to have it with the record. It might be convenient not only to this court but some other court.

Mr. Yeomans: It is perfectly all right to mark it, as long as it is understood it is not offered by the plaintiff as anything in support of its case.

The Court: Well, we will mark it as a defendant's exhibit.

Mr. Margolies: Suppose we mark it, as an agent of the court, by virtue of its having been printed in Volume 13-C-27. There is no reason why either side should be saddled with the cost.

The Court: Very well: I will just retain it, then, without marking it, just as I would any opinion of any court.

Mr. Yeomans: It is a duly published opinion.

Mr. Galland: Your Honor. I think I might be able to supply one scrap of information that will clear up your last question as to whether the carrier had notice of this resolution prior to the acceptance of these shipments. It

had not and could not, because, as I recall, all of these shipments were made before this resolution was passed; and it was for that reason that I mentioned, a short while ago, that I thought we should have it understood that it was passed on December 4, 1942, rather than as "of"; because, by its own terms, it purports to have been a determination [18] as of an earlier date, namely, the day after Pearl Harbor and it was actually passed subsequent to the transportation.

Mr. Yeomans: Some of it went before and some after.

Mr. Galland: Most of it went before, I think.

Mr. Yeomans: Yes, sir.

Mr. Galland: There may have been several that went after, but it was certainly after some of them.

Mr. Margolies: There were shipments in 1943.

Mr. Yeomans: That is right; some before and some after.

The Court: Let me ask you: Is there any provision in law that charges anyone with notice of the Comptroller General's opinions?

Mr. Margolies: I would think that there is not.

The Court: Is there anything in the Statute that charges anyone with notice of the resolutions and actions of the Maritime Commission?

Mr. Margolies: On the notice problem, I do not believe that anybody is chargeable with any published resolution of the Maritime Commission.

The Court: The resolutions are not as a matter of course published in the Federal Register?

Mr. Margolies: They are not to the extent that they do not affect the public. Insofar as they are required by the Federal Register Act to be published because they affect the public, the public would be charged with notice [19] by virtue of the Federal Register Act.

It is not our contention that the carriers are chargeable with notice.

The Court: Of Defendant's Exhibits B and C for identification?

Mr. Margolies: Of Defendant's Exhibits B and C for identification. Our reliance on them relates to the usual presumption, that executive officers of the Federal Government charged with administrating an act and charged with carrying on the Government's business have presumptive validity attached to their acts under—

The Court: I understand that point. I just wanted to be sure that I understood the full contention with respect to the effect of resolutions, exhibits B and C for identification.

Now you have stated to me that there is no contention by the defendant that the plaintiff had knowledge or was charged with knowledge of the existence of the resolutions.

Mr. Margolies: May I add, that in entering into this stipulation it was the opinion of the defendant, joined in, I believe, by plaintiff, that the question for decision by this court was whether the property was military or naval property of the United States, moving for military or naval purposes; and defendant does not contend that by carrying this property at all plaintiff waived its right to [20] those issues.

The Court: Very well. Is there any further evidence which the defendant cares to offer?

Mr. Margolies: We have no further.

The Court: The plaintiff?

Mr. Yeomans: No further evidence.

The Court: Both sides rest?

Mr. Yeomans: We rest as far as plaintiff is concerned.

The Court: All right, Mr. Yeomans.

Mr. Yeomans: Before starting on my actual argument, I do have written a very rough reply to defendant's brief. I thought it might serve some purpose to at least have our views in writing, as well as to present them orally on the briefs. I am doing this and apologizing somewhat for the form it is in, but possibly it will serve some purpose.

The Court: Yes; I will be glad to have the benefit of it.

Mr. Yeomans: I would like to give the court two copies of this.

And also, I noticed after the filing of our original briefs that there were a number of errors in the printed brief; and I have had a copy corrected and I would like to give this to the court possibly to substitute for the one that was filed that has a number of printer's errors. Most of them are obvious but a few of them might not be. [21]

The Court: Very well. Is there any objection to withdrawing the original on file and substituting the corrected copy?

Mr. Yeomans: They are very minor changes, but I think counsel has seen a copy of the ones with the changes made.

Mr. Margolies: On the assurance by plaintiff's counsel that they conform to the changes we have seen, we have no objection.

Mr. Yeomans: It is exactly the same, and the changes are even made in pen so it is obvious the changes that are made.

The Court: Very well. The clerk may withdraw the original now on file and substitute a corrected copy in place thereof. Do you have an extra one for the court's use?

Mr. Yeomans: Yes. Excuse me.

The Court: Mr. Yeomans, I will return to you the court's copy of the brief that has been filed, if you like.

Mr. Yeomans: Thank you.

As a basis of starting off this argument, I think it would be well to go through the stipulation that we have entered into, to have in mind exactly what our factual case is that we are going to argue about. And the way that seemed it could best be presented would be to briefly outline [22] the problem that we had in entering into the stipulation, and what we actually stipulated to, and what we were not able to stipulate to.

The Court: May I interrupt you, Mr. Yeomans, at this point? There are a number of remaining cases. All the cases on file involving these land transportation rates between these parties have been assigned to me, and the thought occurred to me it might be possible to enter into some stipulation with respect to the disposition of those cases.

Are the other cases to abide the event of the decision in this case, or is that practicable?

Mr. Yeomans: Our conclusion in that respect was that undoubtedly the decision in this case will control most of those cases. We were not in a position where we wanted to enter into a stipulation that they would control, because there are some differences. * * *

(Argument omitted from transcript at request of counsel.)

The Court: If there is nothing further, I will submit the matter on the briefs and on the file, and will let you have my decision at the soonest date convenient.

[PLAINTIFF'S EXHIBIT NO. 1]

~~MCc-ESP-10~~
MCc-7785

CONTRACT FOR THE
CONSTRUCTION OF EMERGENCY CARGO SHIPS

This contract entered into as of this 14th day of March, 1941, between the United States Maritime Commission (herein called the "Commission") and California Shipbuilding Corporation, a corporation organized and existing under the laws of the State of Delaware (herein called the "Contractor").

Whereas:

1. Pursuant to the provisions of an Act approved February 6, 1941 (Public No. 5, 77th Congress), the Commission is authorized to construct in the United States ocean-going cargo vessels of such type, size and speed as the Commission may determine to be useful in time of emergency for carrying on the commerce of the United States, and to be capable of the most rapid construction;

2. The Commission has determined to have certain vessels hereinafter described constructed for the aforementioned purpose pursuant to the provisions of the aforesaid Act;

3. Under date of January 11, 1941, the Contractor and the Commission entered into a contract (herein called the "Facilities Contract") whereunder the Contractor agreed to construct for the Commission on land leased or owned by the Contractor such shipyard facilities as are provided for in said Facilities Contract; and

(Plaintiff's Exhibit No. 1)

4. The Contractor is willing to construct the vessels hereinafter described at the site of said shipyard facilities in consideration of a reimbursement to it of the costs of such construction work and the payment by the Commission of a fee upon the terms and conditions hereinafter specified.

Now, therefore, in consideration of the premises and mutual covenants, agreements, and conditions hereinafter set forth, the parties hereto agree as follows:

ARTICLE 1.

The term "Vessel" shall be deemed to include the hulls of the vessels, whether completed or uncompleted, to be constructed by the Contractor pursuant to the terms of this contract, and also all materials, vessel items and appurtenances, vessel machinery and vessel equipment used or to be used in the contruction or equipment thereof.

The term "Facilities" shall be deemed to include the shipyard and facilities and all machinery, materials, items, equipment and appurtenances used or to be used in the construction or equipment thereof, but not the land on which said shipyard and facilities shall be constructed.

The Commission, in entering into this contract, is acting as the representative of the United States of America and wherever reference is made in this contract to property or facilities of, or owned by, the Commission, such reference shall include property or facilities owned by the United States of America furnished under the Facilities Contract.

(Plaintiff's Exhibit No. 1)

ARTICLE 2.

(a) The Contractor, acting as an independent contractor, and not as agent, shall construct, launch, equip and complete ready for service, and deliver to the Commission thirty-one steel hulled, steam-propulsive powered, cargo-carrying vessels (herein called the "Vessels") equipped and constructed with their machinery, materials, items, equipment and appurtenances. The Contractor shall perform its obligations as set forth above at Los Angeles, California, on the site of the Facilities described in the Facilities Contract, in accordance with the terms of this contract and the plans and specifications (herein called the "Plans and Specifications") which have, at or before the execution of this contract, been approved by the Commission and identified by the signatures of the parties hereto, and which are hereby made a part hereof with the same force and effect as though herein set out in full. The Contractor shall furnish all labor, materials, supplies and equipment (except materials, supplies and equipment to be furnished by the Commission) required to perform its obligations as set forth above.

(b) All general language or requirements contained in the Plans and Specifications are intended to amplify, explain and implement the requirements of this contract, but any such general language or requirements inconsistent with the provisions hereof are superseded by this contract. The Plans and Specifications are also intended to explain each other and anything shown upon the Plans and not stipulated in the Specifications, or stipulated in the Specifications and not shown upon the Plans, shall be deemed and considered as if included in both.

(Plaintiff's Exhibit No. 1)

(c) Until the last of the Vessels shall have been completed, unless this Contract shall be terminated at an earlier date, as hereinafter provided, the Contractor, without payment of rent therefor, shall have exclusive use and possession of the Facilities owned by the Commission for the sole purpose of constructing the Vessels upon the terms and conditions hereinafter set forth.

(d) The Contractor at the expense of the Commission shall maintain and keep the Facilities and premises on which such Facilities are constructed, and all appurtenances and equipment thereof, in good order and condition for the work to be performed hereunder.

(e) The Contractor shall police the Facilities and shall use reasonable diligence to exclude all unauthorized persons therefrom and to prevent loss or injury to the Facilities or the Vessels.

(f) The Contractor shall promptly pay any rental due under any lease made by the Contractor for the premises on which the Facilities are located, or any part thereof, and shall duly and faithfully perform each and every of its obligations, undertakings, and covenants under such lease or leases. In the event that the premises on which the Facilities are located, or any part thereof, shall be owned by the Contractor, the Contractor shall pay promptly all taxes, assessments and other charges levied or assessed thereon and shall not create or permit to be created any right, including mortgages, liens, or other incumbrances, by which any person shall have any claim or interest in

(Plaintiff's Exhibit No. 1)

or to any improvement, building, structure, or equipment erected or constructed on said premises pursuant to the Facilities Contract, even though the same shall have been attached thereto and become part thereof.

(g) Without the prior written consent of the Commission, the Contractor shall not use the Facilities or any of the buildings, appurtenances, or equipment located on the premises described in the Facilities Contract for any purpose other than that of constructing the Vessels, and the authorized representatives of the Commission shall have access to the Facilities at all times for the purpose of determining whether the Contractor is complying with the requirements of this contract and the Facilities Contract.

ARTICLE 3.

The Commission reserves (without limitation thereof) the right to correct any errors or omissions in, and to make any changes in, deductions from, or additions to, the Plans and Specifications. However, changes shall not be made in the general dimensions and characteristics of any of the Vessels unless such changes are made with the written consent of the Contractor.

The Contractor shall not depart from the requirements of the Plans and Specifications unless such departure is approved in writing by the Commission. No changes of any nature affecting the construction, equipping and completion of any of the Vessels are to be started or made by the Contractor before such changes have been duly authorized in writing by the Commission.

(Plaintiff's Exhibit No. 1)

ARTICLE 4.

Certain of the materials, equipment, and machinery to be used in the construction of the Vessels will be furnished to the Contractor by the Commission. A list of such materials, equipment, and machinery is attached hereto and marked "Exhibit A," and the Contractor shall not, without the prior written consent of the Commission, purchase or agree to purchase for use in connection with the performance of the work hereunder any of the items listed on said "Exhibit A." The Contractor, at the expense of the Commission, shall adequately store and care for all such materials, equipment and machinery delivered to the site of the Facilities until they shall be incorporated in the Vessels and shall pay all transportation charges thereon which are payable upon delivery.

At any time during the course of the performance of the work hereunder, the Commission may amend said "Exhibit A" so as to add to the list of items therein contained. Within ten days from the date of receipt of a notice of such amendment, the Contractor shall notify the Commission of any items included in such amendment which the Contractor has purchased or agreed to purchase with the approval of the Commission prior to the receipt of notice of the amendment, and such amendment shall be ineffectual as to any such items. The Contractor shall thereafter follow the instructions of the Commission with respect to such items as may be effectively added to said Exhibit by such amendment, but the Contractor shall be reimbursed for any costs incurred by it in following such instructions.

Set forth opposite each item of material, equipment and machinery on "Exhibit A" is a list of dates furnished by

(Plaintiff's Exhibit No. 1)

the Contractor, on or before which the quantities of material and equipment and the items of machinery indicated shall be delivered by the Commission to the site of the Facilities to enable the Contractor to deliver the Vessels in accordance with the schedule of Vessel deliveries contained in Article 5 hereof. On any amendments to Exhibit A the Contractor shall furnish to the Commission the dates on which the additional material covered thereby shall be required in order to enable it to meet said schedule of Vessel deliveries.

ARTICLE 5.

The Contractor shall deliver each of the Vessels to the Commission after such Vessel has been completed ready for service, and has passed the tests as prescribed in the Specifications. Such delivery shall be made at or near the shipyard referred to in Article 2 (a) hereof, at a place alongside of a safe and accessible pier at that place, where there must be sufficient water for the Vessel always to be afloat, custom to the contrary notwithstanding, free and clear of all liens and claims of every nature, or at such other place as may be mutually agreed upon.

Unless prevented by any of the causes enumerated in Article 6 hereof, the work under this contract shall be commenced on or before March 18, 1941 and shall be prosecuted with diligence and the time thereafter within which each of the Vessels is to be delivered to the Commission, unless such time is extended by conditions of "force majeure" as defined in Article 6 hereof, or under any of the other provisions hereof, is to be in accordance with the following schedule:

(Plaintiff's Exhibit No. 1)

Delivery Schedule in Number of Days
After March 18, 1941.

Builder's and M. C. Hull Nos.	Number of Calendar Days*
64	320
65	332
66	344
67	356
68	368
69	380
70	392
71	404
72	420
73	433
74	446
75	458
76	469
77	479
78	492
79	502
80	542
81	554
82	567
83	579
84	590
85	600
86	610
87	622

(Plaintiff's Exhibit No. 1)

Builder's and M. C. Hull Nos.	Number of Calendar Days*
88	650
89	667
90	681
91	693
92	704
93	718
94	731

*Scheduled delivery dates to be computed on basis of calendar days elapsing from March 18, 1941, such date not to be included in computation but day of scheduled delivery to be included therein.

Provided that the Commission in its sole discretion may for any reason extend the time for delivery of the first three Vessels to be constructed hereunder and also in its sole discretion may extend the time for the delivery of the balance of the Vessels or any thereof to the extent that in its judgment said Vessels will be delayed by reason of the delay in the delivery of the said first three (3) Vessels.

It is mutually agreed by and between the parties hereto that time is of the essence of this contract, and that all actions taken by the parties hereto and their agents shall be taken to the end that the performance of this contract will be fully expedited.

The Contractor may in his discretion operate the shipyard and all facilities used in the construction of the Vessels and may carry on the work of constructing the Vessels six (6) days per week (legal holidays excepted)

(Plaintiff's Exhibit No. 1)

and such number of shifts per day as may be determined by the Contractor.

Subject to any applicable law or regulation of any agency of government made pursuant to any such law the base rates of wages paid to employees of the Contractor employed in the performance of this contract shall not be higher than the rate of wages prevailing in shipyards in the municipality or other civil subdivision of the State in which the Facilities are located, or if there shall be no other shipyards in such civil subdivision then in the locality in which the Facilities are located, unless the Commission shall approve the payment of other rates. The Contractor shall submit to the Commission for its approval a statement of the rates to be paid to mechanics, helpers and laborers. No increases in the wage scale established by the Contractor at the beginning of work under the contract shall be made without the written approval of the Commission.

ARTICLE 6.

The term "force majeure" as employed herein shall be deemed to mean all causes whatsoever (except inclement weather of the ordinary seasonable nature) not reasonably within the control of the Contractor among which, but not exclusive of other causes, are acts of God; war between the United States and any foreign country; civil war, riot or insurrection in the United States; requirement of, intervention by or delays caused by civil, naval or military authorities or other agencies of government; arrests and restraints of rulers and people; priorities; blockades; embargoes; vandalism; sabotage; epidemics; strikes, lockouts or other industrial disturbances; earth-

(Plaintiff's Exhibit No. 1)

quakes; landslides; floods, hurricanes and cyclonic storms; damage by lightning; explosions; collisions; strandings; fires; inability of the Contractor to obtain sufficient and adequate labor at wage rates approved by the Commission; shortage of materials and equipment, provided that the Contractor has ordered all necessary materials and equipment at the proper times and used reasonable effort to obtain delivery of such materials and equipment at the time and in the order required to carry on the work properly; delays of carriers by land, sea or air or delays of subcontractors, or delays in the completion of the Facilities for any causes beyond the control of the Contractor including any of those enumerated in this paragraph which delay the starting of or orderly prosecution of the Vessel construction work; or delays due to any failure on the part of the Commission to perform its obligations hereunder, including, but not limited to, failure to act within a reasonable time on subcontracts or plans and specifications prepared by the Contractor and submitted for Commission's approval or failure to furnish the working plans for the Vessels referred to in Article 12 hereof as required by the Contractor, or failure to cause the material listed in "Exhibit A" and any amendments thereof to be delivered at the site of the Facilities on the dates shown in said "Exhibit A" or amendments thereof; or delays due to changes ordered by the Commission in any plans or specifications including any delay resulting from changes in the Facilities referred to in the Facilities Contract made necessary by such changes.

Written notice of any delay caused by "force majeure" and the anticipated result thereof shall, when knowledge thereof has come to the Contractor, be given promptly by

(Plaintiff's Exhibit No. 1)

the Contractor to the Commission. Within twenty (20) days after such cause of delay has ceased to exist, the Contractor shall file with the Commission a statement of the actual delay resulting from such cause. Provided such notices shall have been given the time for delivery of the Vessel or Vessels, or any following Vessel or Vessels affected by such "force majeure," shall be extended for such time as the Contractor shall have been actually delayed in the completion of such Vessel or Vessels by reason of such "force majeure." In the event that the parties are unable to agree that the cause of delay is "force majeure" or as to the extent of the resulting delay, the matter shall be referred to arbitration as hereinafter provided. The duty of submitting and going forward with the evidence before the Arbitrators shall be on the Contractor.

ARTICLE 7.

The Commission will pay or cause to be paid to the Contractor the entire cost to the Contractor of performing this contract plus a fee for which provision is hereafter made; Provided, That in no event shall the amount payable under this contract (including payments to be made by the Commission under the succeeding Articles hereof) exceed $30,000,000, unless the Commission shall determine that the cost of performing this contract plus the fees to be paid to the Contractor hereunder will be in excess of such amount and agree by notice in writing to the Contractor to pay such increased cost plus all fees as calculated upon the basis herein set forth; and provided further, that the Contractor shall not be deemed to have guaranteed that this contract can be performed and any fees paid for said amount and shall in no event be obligated to

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continue its performance of this contract beyond a point at which its obligations under any leases of the premises on which the Facilities provided for in the Facilities Contract shall be constructed and under any contracts for services, labor, material and supplies required for the performance of this contract plus fees payable to the Contractor earned or accrued under the provisions of this contract shall equal the unexpended portion of the amount payable by the Commission hereunder.

A. Such cost shall be determined in accordance with the rules and regulations for determining costs issued by the Commission and entitled "Regulations Prescribing the Method of Determining Profit, Adopted May 4, 1939," as amended, in so far as applicable, and (in so far as the same are not applicable) in accordance with sound accounting practice. There shall be included (but without limitation), in determining such cost, the following items:

1. The actual net cost to the Contractor (after deducting all discounts, refunds, allowances, and price adjustments which have accrued to the benefit of the Contractor) of all materials, equipment, and machinery purchased by the Contractor for the construction of the Vessels or for the maintenance or operation of the Facilities and the premises on which they are constructed during the course of the construction of the Vessels.

2. The actual cost of all labor properly chargeable to the construction and protection of the Vessels, the processing of materials for the construction thereof, and the maintenance, operation and protection of the Facilities and the premises on which they are constructed, including piece work and incentive bonuses, bonuses to shift

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workers, overtime pay, pay for lunch periods and for vacations if actually paid by the Contractor.

3. The salaries and wages of officers, managers, superintendents, foremen, engineers, draftsmen, supervisors, storekeepers, clerks, and laborers and all other employees on the pay roll of the Contractor who are engaged in the maintenance, construction or protection of the Vessels or in the maintenance, operation and protection of the Facilities and the premises on which they are constructed, or in clerical or administrative work in connection with any of such activities.

4. The actual net cost to the Contractor of engineering services, plans and specifications, bills of material, estimates, etc., purchased by the Contractor and reasonable legal and accounting fees specifically approved by the Commission, and charges for clerical and administrative services rendered by others (including affiliates) provided that the incurring of such charges and the rates therefor shall have been approved by the Commission.

5. The actual cost of delivery of the Vessels and of any trials or tests which the Contractor may be required to perform prior to the acceptance of the Vessels.

6. Rental and other payments made by the Contractor during the period of construction of the Vessels, pursuant to the provisions of any lease approved by the Commission under the Facilities Contract.

7. Reasonable rentals or service charges for equipment, including such equipment owned by the Contractor for periods required, the equipment to be in good working order before rental periods begin. The rental or service charge for a particular piece of equipment shall not exceed

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the replacement value (at the beginning of the rental period) of such equipment. Whenever the aggregate rental paid for any item of equipment equals the replacement value (at the beginning of the rental period) of such item of equipment, such equipment shall become the property of the Commission.

8. The actual net cost of fuel, power, water, stationery, telephone, telegraph, reasonable traveling and transportation expense of employees, freight, express, trucking, unloading and handling costs, permits, licenses, royalties for the use of patents when authorized by the Commission or required by the design of the Vessel, Federal and State Social Security, Unemployment Compensation and other similar taxes and charges, excise and other taxes as defined in paragraph 748 of said Regulation, premiums for Workmen's Compensation, public liability, fire and other insurance and bonds to the extent herein provided, and the actual net cost of reconstructing or replacing any work or Facilities destroyed or damaged and not covered by insurance.

9. Actual interest paid or accrued for payment (not in excess of rates approved by the Commission) on loans from others, including affiliates, stockholders, or the parent corporation of the Contractor (subject to the provisions of Article 22 hereof), incurred solely for the purpose of performing this contract and for the period of the construction of the Vessels and for such further periods as the Commission shall approve.

10. The actual net cost of supplies, tools and equipment purchased by the Contractor and used in the construction of the Vessels or for the repair, maintenance

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and operation of tools and equipment during the course of construction of the Vessels and until final acceptance thereof.

11. General, administrative and operating expenses of the Contractor incurred in the performance of this Contract, not otherwise provided for herein, to the extent approved by the Commission.

12. The actual net cost to the Contractor of carrying on a training program reasonable in extent for the training of employees for the shipbuilding project, including (but not limited to) salaries of instructors, rental of training quarters, if required, cost of supplies, materials, equipment and wages to trainees.

13. State, City, and County taxes assessed against the land and improvements upon which the Vessels or any part or parts thereof are being constructed and referable to the period of construction and paid by the Contractor.

14. All proper cancellation costs and charges incurred by the Contractor when cancellations or terminations are directed and approved by the Commission.

15. The Contractor shall be reimbursed for all costs of remedying defective work or replacing materials as required of it by the provisions of Article 12 hereof, or elsewhere under this contract, whether the material or work shall have been furnished or supplied by the Commission or the Contractor.

B. Unless otherwise specifically provided herein, in determining cost reimbursable hereunder, there shall be excluded from such cost (i) the exclusions required by the Regulations above referred to including without limitation those set forth in paragraph 7.23 of said Regulations,

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provided that any expense approved by the Commission prior to the time it is incurred shall not be deemed to be excessive or unreasonable in the absence of fraud or misrepresentation of the Contractor or its employees, or unless such expenses are for materials or equipment which are used for purposes other than performing work under this contract; (ii) depreciation on the Facilities; (iii) salaries or wages, in any form, knowingly paid in violation of Section 1 of Public No. 5 (77th Congress) approved February 6, 1941; and (iv) disbursements made without prior authorization of the Commission for extension or enlargement of the Facilities as described in the Facilities Contract.

C. All excess materials, tools and equipment and other items purchased by the Contractor and for which it has been reimbursed, including scrap, shall remain the property of the Commission and shall be retained and delivered to the Commission or sold for the Commission's account in such manner and at such times as the Commission may direct or approve.

ARTICLE 8.

In addition to reimbursing the Contractor for all its costs as provided in Article 7 hereof, the Commission shall pay the Contractor for its services a base fee in the sum of $110,000 for each Vessel completed, delivered and accepted in accordance with the provisions of this contract. This base fee shall be increased or decreased as determined in the following subarticles, A and B to wit:

(A) If delivery of any Vessel is delayed beyond the delivery date stipulated therefor in Article 5 hereof, then

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the base fee payable to the Contractor under the provisions hereof with respect to said Vessel shall be decreased to cover fixed, agreed and liquidated damages (and not as a penalty) for delay in delivery of each such Vessel an amount equal to $400 for each and every calendar day of such delay; provided that in the event the delivery date for any such Vessel shall be extended under any provision of this contract, the date for reckoning such liquidated damages shall be correspondingly extended. The exaction of such liquidated damages shall not affect any other rights or remedies of the Commission upon default by the Contractor under any other provision of this contract. If any Vessel is completed and ready for tender of delivery to the Commission prior to the delivery date stipulated therefor in Article 5 hereof, or prior to any delivery date that may exist under any extension of time pursuant to any provision hereof, then the base fee payable to the Contractor under the provisions hereof with respect to said Vessel shall be increased by an amount equal to $400 for each and every calendar day elapsing between the date on which such Vessel is actually completed and ready for such tender of delivery and said delivery date.

(B) It is agreed that the estimated average number of man hours of direct and indirect labor required to complete the work to be performed hereunder by the Contractor on each of the Vessels (hereinafter called the "Estimated Average Vessel Hours") is 648,432, (exclusive joiner work) subject to the following adjustments for each such Vessel:

(1) For authorized changes in the Plans and Specifications affecting any such Vessel, an equitable adjustment in the Estimated Average Vessel Hours

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for such Vessel shall be made pursuant to agreement between the parties hereto.

(2) Within ten days after the execution hereof the Contractor has filed with the Commission and the Commission has accepted as the basis for the Estimated Average Vessel Hours as hereinafter set forth a statement of the extent to which it is contemplated the performance hereof will be through outside subcontractors. If any change shall be made in the amount of work so to be performed by subcontractors as so stated, an equitable adjustment shall, pursuant to agreement between the parties hereto, be made in the Estimated Average Vessel Hours for each Vessel affected by such change.

(3) For each day by which the delivery time of any Vessel shall be extended under any of the provisions of this contract, the Estimated Average Vessel Hours for such Vessel shall be increased by an equitable adjustment pursuant to agreement between the parties hereto.

If the actual average number of man hours of direct and indirect labor expended by employees of the Contractor in the completion of any Vessel (hereinafter called the "Actual Average Vessel Hours") shall be less than the Estimated Average Vessel Hours for such Vessel, adjusted as aforesaid, then the fee payable with respect to such Vessel shall be increased by an amount equal to 50¢ multiplied by the difference between the Actual Average Vessel Hours and the Estimated Average Vessel Hours for such Vessel, adjusted as aforesaid; but if the Actual Average Vessel Hours shall be greater than the Esti-

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mated Average Vessel Hours for such Vessel, adjusted as aforesaid, then the fee payable with respect to such Vessel shall be decreased by an amount equal to 33⅓¢ multiplied by the difference between the Actual Average Vessel Hours and the Estimated Average Vessel Hours for such Vessel, as so adjusted.

The total actual number of man hours of direct and indirect labor expended by employees of the Contractor in the completion of all the Vessels constructed hereunder shall be determined upon the completion of the construction of all such Vessels and such total actual number of man hours shall be divided by the number of Vessels so constructed in order to determine the Actual Average Vessel Hours for the purposes of this subarticle (B).

The term "man hours of direct and indirect labor" as used herein shall mean the actual hours worked by all employees of the Contractor except the Contractor's corporate officers, its auditor, general manager, general superintendent, superintendents and general foreman, provided, that with respect to employees compensated upon a weekly or other salary basis other than those above excluded the number of hours deemed to be "actual hours worked" shall be at the rate of forty-eight hours for each week so compensated.

The Commission may substitute for the above set forth method of determining adjustments under this subarticle (B) any other method satisfactory to the Contractor should it at any time, in the judgment of the Commission, appear that the results of the methods prescribed in this subarticle (B) do not reflect equitably the amount to be added to or deducted from the base fee by reason of increased or decreased man hours.

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The net adjusted fee as calculated under the provisions of this Article shall be subject to deductions on account of expenditures made by the Contractor which shall not be reimbursable to the Contractor as provided in Article 7 hereof, which have been reimbursed to the Contractor and which it has retained, but it is specifically covenanted and agreed that in no event shall the net fee to be paid to the Contractor for each Vessel be less than $60,000, or more than $140,000, after the application of all adjustments, additions, deductions, penalties, damages, credits and liabilities of whatever kind, it being further covenanted and agreed that in addition to the net fee per Vessel as herein determined the Commission shall pay the Contractor the full cost of its performance of this contract, with no exclusions or deductions from such cost other than those provided for under the provisions of paragraph B of Article 7 hereof.

ARTICLE 9.

(a) The Contractor agrees to keep records and books of account on a recognized cost accounting basis satisfactory to the Commission and in conformance with a condensed chart of accounts which the Commission will furnish, showing the actual cost to it of all items of labor, materials, equipment, supplies, services and other expenditures of whatever nature for which reimbursement is authorized under the provisions of this contract. Statements and returns relative to expenditures shall be made as and when directed by the Commission.

(b) The Commission and its authorized representatives shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the

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premises, work and materials, to all books, records, correspondence, instruction, plans, drawings, receipts, vouchers and memoranda of every description of the Contractor pertaining to said work and all such books, records and other papers shall be the property of the Commission and shall be surrendered by the Contractor upon the completion of this contract and upon delivery to the Contractor of a release by the Commission, but the Contractor shall have the right to make and may retain copies thereof. Upon the completion of this contract the Commission will give the Contractor duly authenticated copies of such books, records and other papers herein mentioned, or in lieu thereof, will at all times thereafter afford the Contractor proper facilities for inspection of the same.

(c) Any duly authorized representative of the Contractor shall be accorded the privilege of examining and making copies of the books, records and papers furnished by him to the Commission. All information obtained by the Commission from the Contractor's accounts and records shall be treated as confidential.

ARTICLE 10.

The Commission will make semi-monthly payments as soon as practicable after receipt of certified public voucher covering costs reimbursable to the Contractor under this contract, which have been paid by the Contractor prior to the submission of such voucher, and evidence satisfactory to the Commission of the payment by the Contractor of such costs, provided that payments shall be made more frequently and at any time upon submission by the Contractor of certified public voucher (not made the basis of prior payment), with evidence of payment, in an amount

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in excess of $100,000. Any such voucher or part thereof supported by the required evidence shall be paid in any event within 10 calendar days after receipt thereof by the Commission in Washington, D. C.

ARTICLE 11.

Within 15 days after the launching of each Vessel and receipt of public voucher the Commission will pay to the Contractor the sum of $30,000 on account of the fee payable in respect to such Vessel provided for in Article 8 hereof. Within 15 days after the delivery of each Vessel and receipt of public voucher the Commission will make to the Contractor a further payment in the amount of $30,000 on account of such fee. Upon full accounting, which shall be made in any event within six months after the delivery of the last Vessel, the Commission shall pay to the Contractor all balances due it under this contract.

ARTICLE 12.

(a) All material and workmanship furnished by the Contractor, unless otherwise provided in the Specifications, shall be subject to inspection by inspectors of the Commission at any and all proper times during manufacture or construction at any and all places where such manufacture or construction shall be carried on.

(b) The Contractor shall at the expense of the Commission furnish promptly all reasonable facilities and materials, necessary for the Commission's representatives (including inspectors and auditors), including suitably furnished offices with light, heat, telephone, desks, drawing tables, and filing cabinets.

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(c) The Commission will employ an architect to prepare a full set of See Bee tracings of working plans and bills of material required for the construction of the Vessels and the Commission will furnish the same to the Contractor in accordance with a schedule of dates which will be agreed upon by the Contractor and the Commission within two weeks after the signing hereof. If any changes are made in such plans during the course of construction of the Vessels, the Contractor shall promptly furnish the Commission with new tracings showing such changes.

(d) Any working plans not supplied by the Commission shall, as they are prepared durng the progress of the work, be submitted (in such numbers as may be required) to the Commission's representative at the plant, and action thereon by the Commission shall be taken as promptly as possible and in any event within seven days after submission of any such plan.

(e) The Commission shall promptly pass all work and material conforming to the requirements of this contract, and shall promptly reject all work and material not conforming to the requirements of this contract. The Contractor, at the expense of the Commission, shall promptly correct workmanship which does not comply with the requirements of this contract by making the same comply therewith and shall promptly replace any material or equipment which does not conform to such requirements. The Contractor, at the expense of the Commission, shall promptly take all action necessary for the collection or enforcement of any claim it or the Commission may have against any subcontractor or material man for defective workmanship or equipment furnished by the Contractor,

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or if required by the Commission will assign such claim to the Commission and authorize the Commission to bring an action thereon at its own expense and in its own name or that of the Contractor.

(f) All inspection and tests by the Commission shall be performed in such manner as not to unnecessarily delay the work.

ARTICLE 13.

(a) Title to all Vessels and to all materials, equipment, supplies and all other property assembled at the site of the Facilities or elsewhere for the purpose of being used for the construction of the Vessels as well as title to any material, machinery, or equipment ordered for use in connection with the performance of work under this contract to the extent the Commission or the Contractor makes payment therefor, even though delivery thereof has not been made, shall vest in the Commission. These provisions as to title shall not operate to relieve the Contractor of any of its obligations under this contract.

(b) When any payment is to be made hereunder, the Commission, as a condition precedent to making such payment, may, in its descretion, require that affidavits satisfactory to it be furnished by the Contractor showing what, if any, liens or rights in rem of any kind against the Vessels or the materials or equipment on hand for use in the construction thereof have been or can be acquired for or on account of any work done, or any materials or equipment already incorporated as a part of the Vessels, or on hand for that purpose; but it is hereby further stipulated, covenanted and agreed by the Contractor, for itself and on its own account and for and

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on account of all persons, firms, associations, or corporations furnishing labor or material for the Vessels, and this contract is upon the express condition, that no liens or rights in rem of any kind shall lie or attach upon or against the Vessels, or materials or equipment therefor, or any part thereof, or of either, for or on account of any work done upon or about such Vessels, or of any materials or equipment furnished therefor or in connection therewith, or for or on account of any other cause or thing, or of any claims or demands of any kind, except the claims of the Commission: Provided, however, that in case by reason of the laws of any State, the Contractor shall be unable to comply with such express condition, the Commission may waive such condition or take such other action as it may deem proper under the circumstances.

ARTICLE 14.

(a) No patented or patent-pending article or device which involves the payment of any license fee or royalty in addition to the purchase price of such article shall be purchased or supplied by the Contractor in connection with the work under this contract without the prior approval of the Commission.

(b) The Commission will pay directly all royalties, license fees or engineering fees for the introduction, construction, use or operation in any of the Vessels of all patented features, devices, apparatus, machinery or equipment which may be furnished by the Commission under the provisions of Article 4 hereof. The Contractor shall pay all other royalties, license fees, or engineering fees for the introduction or use of patented features in the Vessels whether in connection with the method of their

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design, materials, or their construction or their use and operation, and for the introduction and use of all devices, apparatus, methods and processes employed in connection with the equipment and fitting of each Vessel, if such fees are not paid by the Commission, but any payment so made by the Contractor shall be reimbursed to the Contractor by the Commission.

ARTICLE 15.

Each Vessel shall be built under survey of the American Bureau of Shipping and the Contractor shall allow duly authorized representatives of said Bureau access to the Facilities and to the work of subcontractors and to the Vessels at any and all proper times during the performance of this contract. The Commission will pay all fees charged by said Bureau.

ARTICLE 16.

In the performance of the work covered by this contract the Contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies, as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States; the foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quanti-

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ties and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the Department under the proviso of Title III, Section 3, of the Act of Congress approved March 3, 1933 (41 U. S. C. 10).

ARTICLE 17.

Wherever practicable, the Contractor shall obtain from responsible firms or individuals competent to furnish the materials or equipment, or to undertake the work involved or any part thereof, competitive bids for all materials, equipment, or services required, and shall award orders therefor to the lowest satisfactory bidders; provided that as a condition precedent to the award of any order hereunder it shall obtain the approval of the Commission or its duly authorized representative and upon the approval of the Commission or its duly authorized representative the Contractor may award orders upon the basis of market or negotiated prices. There shall be no mingling of purchases covering materials or services required under this contract and those required by the Contractor for other work. The Contractor shall not make any subcontract for part of the work to be performed hereunder or place any order for materials or services calling for a payment without the prior approval of the Commission, but the Commission may prescribe conditions and limitations subject to which orders may be placed without prior approval. The Contractor may purchase any services or materials required for its performance of this contract from any company or companies associated with or affiliated with the Contractor, it being understood that the Contractor shall be entitled to pay to such companies and they shall be entitled to receive reasonable market prices

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for all services and materials so furnished by them, respectively, to the Contractor with the prior approval of the Commission.

ARTICLE 18.

(a) As a condition to the employment by the Contractor of any person to perform any of the work contemplated by this contract and who will be paid from any funds made available under this contract, the Contractor shall, if the Commission so directs, require such person to execute and to file an affidavit in such form as to satisfy the requirements of said Public No. 5 (77th Congress), but the execution and filing of such affidavit shall be without prejudice to the right of the Commission to require such further evidence in the premises as it may deem desirable.

(b) The Commission may require the removal or discharge of any person employed in or about the Facilities if it is determined that the employment of such person is detrimental to the performance of the work under this contract.

ARTICLE 19.

(a) The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

(b) The Contractor will report monthly, and will cause all subcontractors to report in like manner, within 5 days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls, the aggregate amount of such pay rolls, the man-hours worked, and the total expenditures for materials. He shall furnish to the Department of Labor the names and addresses of

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all subcontractors on the work at the earliest date practicable: Provided, however, that the requirements of this paragraph shall be applicable only for work at the site of the construction project.

(c) The Contractor will comply with the provisions of this paragraph which are substantially the regulations promulgated pursuant to the provisions of Public Act No. 324, 73rd Congress, approved June 13, 1934, (48 Stat. 948) by the Secretary of the Treasury and the Secretary of the Interior:

(i) Said Act reads as follows:

"To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secre-

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tary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week."

(ii) Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans, or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of.....)
) SS:
County of.....)

I, ...(name of party signing affidavit).....(title), do hereby certify that I am (the Employee of)..... (name of Contractor or subcontractor) who supervised the payment of the employees of said Contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of.....(project), for the weekly pay roll period from the.....day of ....., 19....., to the..... day of....., 19.....; that no rebates or deductions from any wages due any such person as set

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out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat, or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above-named project.

.....

Sworn to before me this.....day of....., 19.....

(iii) Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered within 7 days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal Agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such 7-day period to the Federal agency having control of the project.

(iv) At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by sub-paragraph (iii) hereof a

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statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by subparagraph (ii) hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or vice president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

(d) This contract is subject to the provisions of the Act of June 25, 1936 (Public No. 814), entitled "An Act to provide more adequate protection to workmen and laborers on projects, buildings, constructions, improvements, and property wherever situated, belonging to the United States of America, by granting to the several States jurisdiction and authority to apply their State workmen's compensation laws on all property and premises belonging to the United States of America."

ARTICLE 20.

Until otherwise provided by law, provisions of law prohibiting more than 8 hours of labor in any one day of persons engaged upon work covered by this contract shall, in accordance with the provisions of the Act approved October 10, 1940 (Public No. 831, 76th Cong.), be suspended. The provisions of said Act approved October 10, 1940 are applicable to this contract.

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ARTICLE 21.

The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Commission the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts of sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

ARTICLE 22.

The Contractor covenants that it will have and maintain at all times, sufficient working funds for the carrying out of its obligations hereunder, and will make prompt payment for all labor, materials, services, and other charges which are to be paid under this contract, provided that the Contractor will not be in default under this contract for failure to make such payments if such failure is due to the fact that the Commission has not paid any properly executed voucher payable under the terms of this contract within 10 days of its delivery to the Commission at Washington, D. C. Prior to the making of any payment by the Commission to the Contractor hereunder by way of reimbursement or otherwise the Contractor shall furnish to the Commission adequate evidence that the Contractor has commitments, satisfactory to the Commission, of cash loans available to it throughout the period of the Contractor's performance in a total amount of not

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less than $1,600,000, of which total not less than $800,000 shall be non-interest bearing funds supplied by stockholders of the Contractor in such form as to be fully subordinated to all obligations of the Contractor under the provisions of this contract or share capital, fully paid in cash.

ARTICLE 23.

The following shall constitute events of default under this contract:

(a) Failure of the Contractor in any respect to use due diligence in proceeding with the performance of the work required under this contract, or failure to perform any of the covenants on its part to be performed hereunder, provided that the Commission in either instance shall give notice to the Contractor as to such failure and Contractor shall not within thirty days after being so notified cure such failure.

(b) The filing by the Contractor of a petition in bankruptcy or for reorganization under the Bankruptcy Act or the entry of an order upon petition against the Contractor adjudicating the Contractor a bankrupt, or the appointment of a receiver or receivers of the Contractor or any property belonging to the Contractor necessary for the performance of its obligations under this agreement.

ARTICLE 24.

(a) Upon the occurrence of any of the events of default set forth in Article 23 hereof the Commission may terminate this contract and enter upon the site of the Facilities referred to in the Facilities Contract and take possession thereof as well as of any Vessels either com-

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pleted or uncompleted and any machinery, materials, fittings, equipment and supplies theretofore or thereafter delivered at the site of the Facilities to be incorporated in the construction or the equipment of the Vessels, or to be used in connection therewith, together with all plans, specifications, calculations and other records required for the construction or equipment of the Vessels. The termination of this contract, pursuant to the provisions of this Article, shall terminate the Facilities Contract in accordance with the terms of Article 23 thereof, and in such event the rights and obligations of the parties under the Facilities Contract shall be those stipulated in said Article 23 in case of the occurrence of an event of default thereunder. Subsequent to termination under this Article the Contractor shall not have any right to use or occupy the premises on which the Facilities or any part thereof shall have been erected or constructed. In the event that such premises or any part thereof have been leased by the Contractor from third parties, the Contractor shall promptly execute an assignment of the lease or leases to said premises, which assignment shall be satisfactory in form and substance to the Commission. In the event that said premises or any part thereof are owned by the Contractor, but leased to the Commission, any permit, permission or license theretofore granted by the Commission to the Contractor to use said premises during the term of such lease shall automatically terminate upon termination of this Contract hereunder pursuant, and the Commission shall have the right to use and occupy the premises as lessee of the Contractor under the terms of any lease which it may have with the Contractor.

(Plaintiff's Exhibit No. 1)

(b) As soon as is practicable after termination of this contract pursuant to the provisions of this Article the Commission will make an audit of the Contractor's accounts and pay to him an amount equal to all costs not theretofore paid by the Commission to which the Contractor may then be entitled under the provisions of Article 7 hereof. After the effective date of termination the Contractor shall receive no further payments on account of the fee provided for in Article 8 hereof and all rights of the Contractor to receive any such payments shall cease and determine except that the Contractor shall be entitled to such payments on account of its fee as shall have accrued by reason of launchings or deliveries of Vessels launched or delivered prior to such effective date of termination.

(c) The Commission may waive the right to terminate the contract and take possession upon default, or may exercise such right and subsequently permit the Contractor to resume the performance of this contract without prejudice to the Commission's right to take such possession at a later time for the same or any subsequent default.

ARTICLE 25.

The Commission may at any time prior to the completion of the work to be performed cancel this contract upon written notice to the Contractor. Upon the effective date of such cancellation the Contractor shall stop all work hereunder except as otherwise directed by the Commission. In the event of cancellation under this Article, the Contractor shall be paid all costs reimbursable under Article 7 hereof which have been incurred prior to the effective

(Plaintiff's Exhibit No. 1)

date of cancellation or which are incurred by him in the performance of work directed to be done by the Commission in completing partially completed vessels or which he may be required to pay or be liable for the payment of by reason of such cancellation. In the event of cancellation pursuant to this Article 25 the Commission shall pay to the Contractor as compensation for its work and services under this contract the following fees:

(i) With respect to each Vessel completed and delivered hereunder up to and including 12 Vessels, the sum of $140,000 per Vessel, less any payments which have been made on account of Contractor's fee respecting any such Vessel.

(ii) With respect to each of the balance of the Vessels completed and delivered hereunder the sum of $110,000 per Vessel, less any payments which have been made on account of Contractor's fee respecting any such Vessel.

(iii) With respect to each Vessel partially completed on which work has been stopped under this Article, a fee equal to the percentage of work completed on such Vessel multiplied by $140,000, in case less than 13 Vessels have been completed and delivered, or by $110,000 if more than 12 Vessels have been completed and delivered. In determining such percentage of completion due account shall be taken of materials on hand whether partially worked or not, and allowance shall be made for items furnished by the Commission and delivered to the Contractor.

(Plaintiff's Exhibit No. 1)

The provisions of this Article in respect to the fee payable on cancellation shall not apply to any renewal or extensions of this Contract, such fee to be determined by negotiation in the event of any such renewal or extension.

ARTICLE 26.

In the event that during the course of the work hereunder the Facilities shall be destroyed or so damaged as to prevent work on the Vessels for an estimated period of 90 days or more, the Commission may elect to terminate this contract or have the Contractor reconstruct or repair the Facilities.

If the Commission shall elect to have the Facilities reconstructed or repaired by the Contractor the Contractor shall be paid the cost of the reconstruction or repair work. If the Commission shall elect to terminate the contract the payments to be made to the Contractor shall be determined in accordance with the provisions of Article 25 hereof.

ARTICLE 27.

No member of or delegate to Congress, nor Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, except as provided in Section 116 of the Act approved March 4, 1909 (35 Stats. 1109). No member of or delegate to Congress, nor Resident Commissioner, shall be employed by the Contractor either with or without compensation as an attorney, agent, officer, or director. (Sec. 805 (e), Merchant Marine Act, 1936.)

(Plaintiff's Exhibit No. 1)

ARTICLE 28.

The Contractor may, in its discretion, and shall, if and as required by the Commission, secure fidelity and other similar bonds, workmen's compensation, public liability, and automobile liability insurance and such other insurance as may be required by the laws of the state in which the Facilities are located. The Contractor may also obtain other insurance against liabilities of the Contractor to any third person for any cause whatsoever except liabilities adequately covered by insurance provided by the Commission for benefit of itself and the Contractor. The Contractor shall also secure such other insurance as the Commission may direct or approve.

The Contractor shall have no duty to insure against risk of loss of or damage to any property of the Commission including, without limitation, the Facilities and Vessels or any part thereof unless the Commission shall, in writing, direct the Contractor to insure such property, and then only to the extent and in the manner directed. The Commission hereby releases the Contractor from any liability on account of loss of or damage to any property of the Commission not covered by insurance.

All insurance required pursuant to instruction of the Commission shall at all times be maintained with companies, underwriters, or underwriting funds, in amounts and under forms of policies, satisfactory to the Commission.

The Contractor shall not be deemed to have warranted the validity or coverage of any such insurance. In the event that any of the insurance required by the Commission hereunder by reason of any act, omission, or neg-

(Plaintiff's Exhibit No. 1)

ligence of the Contractor shall not be kept in full force and effect, the Contractor shall pay to the Commission all losses and indemnify the Commission against all claims and demands which would otherwise have been covered by such insurance.

ARTICLE 29.

In the event of any dispute or difference of opinion between the parties hereto as to any matter or thing arising out of or relating to this contract, or any provision hereof, which cannot be settled between the parties themselves (except disputes as to the occurrence of an event of default under Article 23 hereof which disputes shall not be the subject of arbitration) they shall submit the matter in dispute to arbitration by three disinterested arbitrators, each of the parties hereto to choose one arbitrator and the two so chosen to choose the third arbitrator. The party desiring such arbitration shall give to the other party written notice of its desire, specifying the question or questions to be arbitrated and naming the arbitrator chosen by it.

Within a reasonable time thereafter, not exceeding twenty (20) calendar days, the other party shall give in like manner like written notice specifying any additional questions to be arbitrated and naming the arbitrator chosen by it.

If a party hereto shall fail to appoint an arbitrator within twenty (20) calendar days after the other party

(Plaintiff's Exhibit No. 1)

shall have so given such written notice of its desire to arbitrate, the party having appointed the arbitrator may thereupon request the American Arbitration Association to appoint the arbitrator for the party in default and such Association shall thereupon appoint such arbitrator. The two arbitrators thus chosen shall then select the third. In the event that the two arbitrators chosen by or for the parties hereto fail, within ten (10) calendar days, to select the third arbitrator, the third arbitrator, upon written request of either party hereto, shall be appointed by the American Arbitration Association. Should said American Arbitration Association cease to exist or fail or refuse for a period of twenty (20) days to appoint an arbitrator after having been requested to do so by either party hereto, in the manner herein provided, then such party may request any judge of any United States Circuit Court of Appeals to appoint such arbitrator, which judge shall thereupon be fully authorized to make such appointment. The decision of any two of the three arbitrators thus chosen when reduced to writing and signed by them shall be final, conclusive and binding upon both parties hereto.

The arbitrators so appointed shall determine which party shall assume the expenses of such arbitration or the proportion of such expenses which each party shall bear; and the arbitration expenses so allocated shall be paid direct by the party or parties by which the same are directed to be paid.

(Plaintiff's Exhibit No. 1)

In Witness Whereof, the parties hereto have executed five original counterparts of this agreement as of the day and year first above written with the intent that each of them shall have full force and effect independently of the others; but full performance of one shall be deemed full performance of all.

UNITED STATES MARITIME COMMISSION

(Seal) By: E. S. LAND
Chairman

Attest:

W. C. PEET, JR.
Secretary

CALIFORNIA SHIPBUILDING CORPORATION

(Seal) By: JOSEPH HAAG, JR.
Vice President

Attest:

CHAS. F. STRENZ
Assistant Secretary

Approved as to Form:

WADE H. SKINNER
Assistant General Counsel
U. S. Maritime Commission

WSB
J. E. Schmeltzer
R. E. Anderson

(Plaintiff's Exhibit No. 1)

June 30, 1942

California Shipbuilding Corporation
P. O. Box 966
Wilmington, California

Subject: Change of contract number from MCc-ESP-10 to MCc-7785

Gentlemen:

The Commission has determined to defray the cost of construction of the 31 vessels (Contractor's Hulls Nos. 1, 2, 3, 4, 5, 6, 7, 8, 10, 13, 17, 18, 19, 20, 21, 22, 23, 27, 31, 32, 33, 34, 35, 36, 37, 41, 45, 46, 47, 48 & 49 and Commission's Hulls No. 64 to 94, inclusive) covered by your contract with the Commission, dated March 14, 1941, as amended (No. MCc-ESP-10), from funds made available under the provisions of Public Law No. 247 instead of Public Law No. 5, as indicated in said contract.

You are requested, in submitting future vouchers for payment under said contract, or whenever necessary to make reference to the contract number of said contract, to use the contract number "MCc-7785" instead of "MCc-ESP-10." The contract number of said contract is hereby changed from "MCc-ESP-10" to "MCc-7785."

A copy of this communication should be attached to Counterparts II and IV of the executed contract which were forwarded to you for your files. Mimeographed copies of this communication will be furnished to you at a later date to be attached to your conformed copies of said contract.

Very truly yours,

(Sgd.) E. S. LAND
E. S. Land
Chairman

(Plaintiff's Exhibit No. 1)

Addendum No. 1
Contract MCc-ESP-10

This Agreement, made and entered into as of the 19th day of March, 1941, between the United States Maritime Commission (herein called the "Commission") and California Shipbuilding Corporation, a corporation organized and existing under the laws of the State of Delaware (herein called the "Contractor"),

Whereas:

1. Under date of March 14, 1941, the Commission and the Contractor entered into a contract (herein called the "Ship Construction Contract") for the construction of certain vessels therein described; and

2. The Commission will enter into a contract with Gibbs & Cox, Inc., naval architects, providing, among other things, for the performance of certain engineering work and the preparation of specifications and requisitions and the purchase of material, machinery and equipment for the vessels to be constructed under the Ship Construction Contract, which services shall include the preparation of See Bee tracings of working plans and bills of material referred to in paragraph (c) of Article 12 of the Ship Construction Contract.

Now, Therefore, the parties hereto agree to amend Article 12 of the Ship Construction Contract so as to add thereto a paragraph lettered (g), which paragraph shall read as follows:

> "(g) The Contractor may employ the architect referred to in paragraph (c) hereof in connection with the construction of the Vessels to perform ser-

(Plaintiff's Exhibit No. 1)

vices in addition to those referred to in said paragraph (c), and the Commission, if it authorizes or approves such employment of the architect, shall pay to said architect all the cost of such additional services as provided in the contract between the Commission and said architect."

In Witness Whereof the parties hereto have executed this agreement as of the day and year first above written.

UNITED STATES MARITIME COMMISSION

(Seal) By: E. S. LAND
Chairman

Attest:
W. C. PEET, JR.
Secretary

CALIFORNIA SHIPBUILDING CORPORATION

(Seal) By: JOSEPH HAAG, JR.
Vice President

Attest:
CHAS. F. STRENZ
Assistant Secretary

Approved as to Form:
WADE H. SKINNER
Assistant General Counsel
U. S. Maritime Commission

WSB

Case No. 4256 WM Civ. Pacific Electric vs. U. S. Pltf. Exhibit 1. Date 10/30/46. No. 1 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

[Endorsed]: Filed Jan. 23, 1948. Edmund L. Smith, Clerk. [23]

[Endorsed]: No. 11843. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Pacific Electric Railway Company, a corporation, Appellee. Pacific Electric Railway Company, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeals From the District Court of the United States for the Southern District of California, Central Division.

Filed January 28, 1948.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. C. C. A. 11843

UNITED STATES OF AMERICA,
Appellant and Cross-Appellee,

v.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,
Appellee and Cross-Appellant.

STATEMENT OF POINTS ON WHICH THE UNITED STATES INTENDS TO RELY AS APPELLANT

Rule 75(d)

The points on which the United States intends to rely as appellant are as follows:

1. The District Court erred in holding that the shipments covered by Government Bills of Lading Nos. MC-88579, MC-28270, and MC-34759 were not the property of the United States at the time of shipment.

2. The District Court erred in holding that plaintiff is entitled to full commercial rates on the shipments covered by said Government Bills of Lading.

3. The District Court erred in not holding that the shipments covered by said Government Bills of Lading at all times while undergoing transportation thereunder were

"Property of the United States" according to the meaning of that phrase, Section 321(a) of the Transportation Act of September 18th, 1940, and in not holding that the shipments were therefore entitled to move at land-grant freight rates.

4. The District Court erred in awarding judgment for plaintiff.

Respectfully submitted,

H. G. MORISON
Acting Asst. Attorney General

JAMES M. CARTER
United States Attorney

CLYDE C. DOWNING
ARLINE MARTIN
Assistant U. S. Attorneys

By Arline Martin

Attorneys for Appellant and Cross-Appeelle

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 5, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause]

STATEMENT OF POINTS ON WHICH PACIFIC ELECTRIC RAILWAY COMPANY INTENDS TO RELY AS APPELLANT

The appellant, Pacific Electric Railway Company, a corporation, hereby states that in its appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled proceeding, intends to rely on the following points.

1. The District Court erred in not awarding plaintiff judgment in the sum of $8,943.82, instead of judgment in the sum of $1,143.66, as awarded.

2. The District Court erred in determining that the shipment involved were "military or naval property moving for military or naval and not for civil use" within the meaning of Section 321(a) of the Transportation Act of 1940.

3. The District Court erred in not allowing plaintiff full commercial rates on all shipments involved in the action.

Dated this 7th day of February, 1948.

Respectfully submitted,

FRANK KARR
C. W. CORNELL
E. D. YEOMANS
By E. D. Yeomans

Attorneys for Appellant, Pacific Electric Railway Company

[Endorsed]: Filed Feb. 9, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause]

STIPULATION DESIGNATING PORTIONS OF THE RECORD TO BE PRINTED UNDER RULE 19

It Is Hereby Stipulated and Agreed, by and between the parties in the above entitled action, by and through their respective counsel, that the portions of the record to be printed shall consist of the entire certified typewritten transcript of record, as furnished by the clerk of the District Court, including all exhibits.

Dated: February 10, 1948.

Respectfully submitted,

H. G. MORISON
Acting Asst. Attorney General
JAMES M. CARTER
United States Attorney
CLYDE C. DOWNING
ARLINE MARTIN
Assistant U. S. Attorneys
By Arline Martin
Attorneys for Appellant and Cross-Appellee

FRANK KARR
C. W. CORNELL
E. D. YEOMANS
By E. D. Yeomans
Attorneys for Appellee and Cross-Appellant

[Endorsed]: Filed Feb. 11, 1948. Paul P. O'Brien, Clerk.

No. 11843.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,

Appellee.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF FOR PACIFIC ELECTRIC RAILWAY COMPANY.

FRANK KARR,
C. W. CORNELL,
E. D. YEOMANS,
670 Pacific Electric Building, Los Angeles 14,
Attorneys for Pacific Electric Railway Company.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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No. 11843.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,

Appellee.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF FOR PACIFIC ELECTRIC RAILWAY COMPANY.

Opinion Below.

The decision of the District Court is reported in 71 Fed. Supp. 987, dated May 19, 1947 and is contained in the record at pages 41-46. The findings of fact and conclusions of law and judgment are at pages 47-51 of the record.

Jurisdiction.

This action was brought under the Tucker Act (March 3, 1911), 36 Stat. 1091, 1093, c. 231, as amended, 28 U. S. C. A. §41 (20), 7 F. C. A. Title 28, §41 (20), [R. 2.]

Statutes Involved.

The case involves the construction of Section 321(a) of Part II, Title III of the Transportation Act of 1940, and the complete provisions of this section and of Section 321(b) are set forth in the appendix.

Statement of Points to Be Urged.

The Statement of points on which Pacific Electric Railway Company intends to rely as appellant is set forth in the record at page 133. Specifically, Pacific Electric Railway Company urges that the Conclusions of Law and Judgment are erroneous in determining in paragraphs I and IV that "all the shipments involved in this action were shipments of 'military or naval property moving for military or naval and not for civil use' within the meaning of Section 321(a) of the Transportation Act of 1940," and that "defendant was entitled to land grant rates on all the shipments involved in this action other than the shipments" as to which the trial court found were not the property of the United States at the time of shipment.

Statement of the Case.

The issues of this case and most of the facts are contained in the Stipulation of Facts. [R. 14-39.] The issues agreed upon in the Stipulation of Facts superseded the issues as raised in the Petition and Answer. [R. 60.]

This case involves the question of the correct freight charges applicable to shipments transported by plaintiff and connecting carriers for the defendant, acting through the United States Maritime Commission. Plaintiff claims full commercial rates are due on these shipments, and the suit is for the difference between the amount paid and the full commercial rate. The Government claims that land grant rates are applicable, and that plaintiff has been fully paid. The payment which has been made is admittedly the land grant rate. The amount claimed by plaintiff is admittedly the full commercial rate. The determination of the correct freight charges is governed by the construction to be given the following portion of Section 321(a) of Part II, Title III of the Transportation Act of 1940 (49 U. S. C. A., Sec. 65):

> "Notwithstanding any provision of law, but subject to the provisions of sections 1(7) and 22 of The Interstate Commerce Act, as amended, *the full applicable commercial rates, fares, or charges, shall be paid for transportation by any common carrier subject to such Act of any* persons or *property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use* or to the transportation of members of the military or

naval forces of the United States (or of property of such members) when such members are traveling on official duty; . . ."

The above provision was eliminated from Section 321(a) by the Act of December 12, 1945, 59 Stat. 606, c. 573, 49 U. S. C. A. Section 65a, the elimination being effective October 1, 1946. All of the shipments involved in this case were prior to October 1, 1946, the dates of delivery being between December 29, 1941 and June 23, 1943. There is, therefore, no question that the above quoted portion of Section 321(a) is applicable to all the shipments in this case. There is also no question that the requirements of Section 321(b) have been met by all carriers involved. [R. 22-23.]

Plaintiff, as the last in a series of connecting common carriers by rail, transported certain materials for use in the construction of Liberty ships built by California Shipbuilding Corporation for the United States Maritime Commission. [R. 14-15.] These Liberty ships were being constructed by California Shipbuilding Corporation under contracts with the Maritime Commission entered into pursuant to the following Acts [R. 15-19]:

1. Act of February 6, 1941 (Public Law No. 5, 77th Congress, 55 Stat. 5);
2. Act of March 27, 1941 (Public Law No. 23, 77th Congress, 55 Stat. 53), "Defense Aid Supplemental Appropriation Act";
3. Act of August 25, 1941 (Public Law No. 247, 77th Congress, 55 Stat. 669 at 681), "First Supplemental National Defense Appropriation Act, 1942";
4. Act of June 27, 1942 (Public Law No. 630, 77th Congress, 56 Stat. 392 at 418), "Independent Offices Appropriation Act, 1943".

The following is a statement showing the materials shipped, the carrier's bill number, the bill of lading number, the purchase contract number, and the amount in dispute:

Materials Shipped	Carrier's Bill No.	Bill of Lading Number	Purchase Contract Number	Amount in Dispute
Condensers (Machinery)	F-18436-3	MC-218872	CD-MC-42-110 (MCc-3173)	$ 375.40
Power boilers & fixtures	F-10611-1	MC-21162	MCc-(ESP)-1008	600.51
Steel Plates	F-10503-12	MC-88579	MCc-(ESP)-1520	321.02*
Steel angles, steel channels & steel plates	F-10610-1	MC-22992	MCc-(ESP)-1145	201.89*
		MC-19113	MCc-(ESP)-1016	
			MCc-(ESP)-1083	609.19
Steel plates & steel sheets	F-10540-1	MC-28270	MCc-(ESP)-1837	420.02*
		MC-34759	MCc-(ESP)-2690	200.73*
Steel plates	F-21750-7	MC-411214 MC-411234 MC-411239 MC-411273	PD-MC-43-10664 (MCc-7300)	5,312.62
Engine parts	F-10535-1	MC-16624 MC-16623 MC-16626 MC-16627 MC-16629	MCc-(ESP)-1028	496.69
Engine parts	F-11274-4	MC-37295 MC-37321 MC-37322 MC-37325 MC-37326	MCc-(ESP)-1020	405.75
	Total Amount in Dispute			$8,943.82

*Indicates shipments as to which trial court held for plaintiff on the ground that they were not the property of the United States at the time of shipment.

Questions Presented.

The question presented is whether plaintiff is entitled to full commercial rates on the shipments involved, or whether land grant rates apply.

In order to determine whether land grant rates or full commercial rates are applicable to these shipments in question under the provisions of Section 321(a), there are three questions:

1. Were the shipments military or naval property?
2. Were the shipments moving for military or naval and not for civil use?
3. Were the shipments the property of the United States?

The trial court determined that all of the shipments were military or naval property moving for military or naval and not for civil use. It is from this determination that Pacific Electric Railway Company is appealing.

The trial court found as to certain of the shipments that they were not property of the United States at the time of shipment, and therefore, not entitled to land grant rates. It is from this determination that the United States is appealing.

Summary of Argument.

I. Construction of Section 321(a) by the United States Supreme Court.

II. Materials in This Case Were Not Military or Naval Property Moving for Military or Naval and Not for Civil Use Within the Meaning of Section 321(a).

(a) Use for which materials shipped in this case were intended.

(b) The Maritime Commission under Merchant Marine Act of 1936 and the appropriations under which the ships in question were constructed.

(c) What shipments by the Maritime Commission are "military and naval" and what shipments are civil?

(d) Time when character of shipment is to be determined.

(e) Summary of reasons why materials in this case were not military or naval property moving for military or naval and not for civil use within the meaning of Section 321(a).

III. The Trial Court Properly Held for Pacific Electric Railway Company as to Certain of the Shipments as Title Was Not in the United States at the Time of Shipment.

ARGUMENT.

I.

Construction of Section 321(a) by United States Supreme Court.

Two decisions of the United States Supreme Court have considered the construction to be given to the portion of Section 321(a) in question, to-wit, *United States v. Powell,* 91 L. Ed. 868, 330 U. S. 238, 67 S. Ct. 742, March 3, 1947, and *Northern Pacific Ry. Co. v. United States,* 91 L. Ed. 876, 330 U. S. 248, 67 S. Ct. 747, March 3, 1947. A copy of these decisions is set forth in the Appendix. In the case of *United States v. Powell,* the Supreme Court held shipments of fertilizer to Great Britain under the Lend-Lease Act were not entitled to land grant rates, and the Court stated in regard to the meaning of the phrase "military or naval property of the United States moving for military or naval and not for civil use" within the meaning of Section 321(a) of the Transportation Act, 91 L. Ed. 873:

> ". . . But it is apparent from the face of the statute that there are important limitations on the type of property which must be carried at less than the applicable commercial rates. In the first place, it is not the transportation of 'all' property of the United States that is excepted but only the transportation of 'military or naval' property of the United States. In the second place, the excepted property must be 'moving for military or naval and not for civil use.' Thus the scope of the clause is restricted both by the nature of the property shipped and by the use to which it will be put at the end of the transportation."

Further in the opinion, pages 874 and 875, the Court stated:

> ". . . In September, 1940, when the Transportation Act was passed, Congress and the nation were visibly aware of the possibilities of war. Appropriations for the army and navy were being increased and the scope of their operations widened, alien registration was required, training of civilians for military service was authorized, development of stock piles of strategic and critical materials was encouraged —to mention only a few of the measures being passed in the interests of national defense. See 50 Yale L. J. 250. Moreover, the realities of total war were by then plain to all. Europe had fallen; militarism was rampant. Yet in spite of our acute awareness of the nature of total war, in spite of the many measures being enacted and the many steps being taken by the Congress and the Chief Executive to prepare our national defense, §321(a) of the Transportation Act was couched in different terms. In other parts of that Act, as in many other Congressional enactments passed during the period, the exigencies of national defense constituted the standard to govern administrative action. But the standard written into §321(a) did not reflect the necessities of national defense or the demands which total war makes on an economy. It used more conventional language—'military or naval' use as contrasted to 'civil' use. That obviously is not conclusive on the problem of interpretation which these cases present. But in light of the environment in which §321(a) was written we are reluctant to conclude that Congress meant 'all property of the United States transported for the national defense' when it used more restricted language.

"In the second place, the language of §321(a) emphasizes a distinction which would be largely obliterated if the requirements of national defense, accentuated by a total war being waged in other parts of the world, were read into it. Section 321(a) uses 'military or naval' use in contrast to 'civil' use. Yet if these fertilizer shipments are not for 'civil' use, we would find it difficult to hold that like shipments by the Government to farmers in this country during the course of the war were for 'civil' use. For in total war food supplies of allies are pooled; and the importance of maintaining full agricultural production in this country if the war effort was to be successful, cannot be gainsaid. When the resources of a nation are mobilized for war, most of what it does is for a military end—whether it be rationing, or increased industrial or agricultural production, price control, or the host of other familiar activities. But in common parlance, such activities are civil, not military. It seems to us that Congress marked that distinction when it wrote §321(a). If that is not the distinction, then 'for military or naval and not for civil use' would have to be read 'for military or naval use or for civil use which serves the national defense.' So to construe §321(a) would, it seems to us, largely or substantially wipe out the line which Congress drew and, in time of war, would blend 'civil' and 'military' when Congress undertook to separate them. Yet §321(a) was designed as permanent legislation, not as a temporary measure to meet the exigencies of war. It was to supply the standard by which rates for government shipments were to be determined at all times—in peace as well as in war. Only if the distinction between 'military' and 'civil' which common parlance marks is preserved, will the statute have a constant meaning whether shipments are made in

days of peace, at times when there is hurried activity for defense, or during a state of war.

"In the third place, the exception in §321(a) extends not only to the transportation of specified property for specified uses. It extends as well to 'the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty . . .' That clause plainly does not include the multitude of civilians employed by the Government during the war and exclusively engaged in furthering the war effort, whether they be lend-lease officials or others. Thus, the entire except clause contained in §321(a) will receive a more harmonious construction if the scope of 'military or naval' is less broadly construed, so as to be more consonant with the restrictive sense in which it is obviously used in the personnel portion of the clause."

In the case of *Northern Pacific Railway Company v. United States,* the Supreme Court held that copper cable for use in the installation of degaussing equipment on a cargo vessel, lumber for construction of munitions plant, lumber for construction of Marine Corps pontons, bowling alleys for Dutch Harbor, and liquid paving asphalt for Cold Bay, Alaska, airport, were materials entitled to land grant rates. The Court in its opinion, 91 L. Ed. 880 and 881 stated as follows:

". . . And as we have said, the property in each case was at the time of shipment property of the United States. The question remains whether within the meaning of §321(a) it was 'military or naval' property and, if so, whether it was 'moving for military or naval' use.

"There is a suggestion that since the shipment of asphalt was to a civilian agency, the Civil Aeronautics Authority, it was not 'military or naval' property. The theory is that 'military or naval' property means only property shipped by or under control of the Army or Navy.

"We see no merit in that suggestion. Section 321(a) makes no reference to specific agencies or departments of government. The fact that the War or Navy Department does the procurement might, of course, carry special weight or be decisive in close cases. But it is well known that procurement of military supplies or war material is often handled by agencies other than the War and Navy Departments. Procurement of cargo and transport vessels by the Maritime Commission is an outstanding example. See Merchant Marine Act of [June 29] 1936, c. 858, §902, 49 Stat. 1985, 2015, 2016, as amended, 46 USCA §1242, 10 F. C. A. title 46, §1242. And shortly before the Transportation Act of 1940 was enacted, Congress by the Act of June 25, 1940, 54 Stat. 572-574, c. 427, authorized the Reconstruction Finance Corporation to create subsidiary corporations to purchase and produce equipment, supplies, and machinery for the manufacture of arms, ammunition, and implements of war. And later that Act was amended to enable those corporations to purchase or produce any supply or article necessary for the national defense or war effort. Act of June 10, 1941, 55 Stat. 248, 249, c. 190. As we have held in United States v. Powell (U. S.) *supra,* not every purchase which furthers the national defense is for 'military or naval' use within the meaning of §321(a). But property may fall within that category though it is procured by departments other than War or Navy.

"It is also suggested that the property covered by the exception in §321(a) is confined to property for ultimate use directly by the armed forces. Under that view materials shipped for the construction of vessels for the Maritime Commission and used to service troops at home or abroad would not be 'military or naval' property. We likewise reject that argument. Civilian agencies may service the armed forces or act as adjuncts to them. The Maritime Commission is a good example. An army and navy on foreign shores or in foreign waters cannot live and fight without a supply fleet in their support. The agency, whether civil or military, which performs that function is serving the armed forces. The property which it employs in that service is military or naval property, serving a military or naval function."

Later, at page 881, the Court stated:

"Military or naval property may move for civil use, as where Army or Navy surplus supplies are shipped for sale to the public. But in general the use to which the property is to be put is the controlling test of its military or naval character. Pencils as well as rifles may be military property. Indeed, the nature of modern war, its multifarious aspects, the requirements of the men and women who constitute the armed forces and their adjuncts, give military or naval property such a broad sweep as to include almost any type of property. More than articles actually used by military or naval personnel in combat are included. Military or naval use includes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, all property which serves their many needs or wants in training or preparation for war, in combat, in maintaining them at home

or abroad, in their occupation after victory is won. It is the relation of the shipment to the military or naval effort that is controlling under §321(a) . . ."

At page 883, the Court stated:

". . . We have more in §321(a) than a declaration that 'military or naval' property is entitled to land-grant rates. Congress went further and drew the line between property moving for 'military or naval' use and property moving for 'civil' use. As we have said, the controlling test is the use to which the property is dedicated or devoted. The fact that Congress did not define what was a 'military or naval' use as distinguished from a 'civil' use is unimportant. The classification made by Congress under this Act, unlike that made under the acts on which petitioner relies, was all inclusive, not partial. What is military or naval is contrasted to what is civil. The normal connotation of one serves to delimit or expand the other. It is in that context that 'military or naval' must be construed."

The Court reached the following conclusions as to materials involved in this case, at page 882:

"Measured by that test, there can be no doubt that the five types of property involved in the present litigation were 'military or naval' property of the United States 'moving for military or naval and not for civil use' within the meaning of §321(a). The lumber for the pontons, the asphalt for the airfield, the lumber for the ammunition plant were used in Army or Navy projects directly related to combat preparation or to actual combat. Copper cable for the cargo vessel, though farther removed from that category, was well within the definition of 'military or naval' property. It, too, was a defensive weapon.

> Beyond that it was purchased by the Navy Department and consigned to one of its officers. It was supplied pursuant to Navy specifications; and the ship on which it was installed was being prepared for possible ultimate use by the Navy. The bowling alleys were also well within the statutory classification. The needs of the armed forces plainly include recreational facilities. The morale and physical condition of combat forces are as important to the successful prosecution of a war as their equipment. The fact that the bowling alleys were planned for initial use of civilian workers makes no difference. It is the nature of the work being done, not the status of the person handling the materials, that is decisive. Supplies to maintain civilians repairing Army or Navy planes is a case in point. The dominant purpose of the project in this case was the same whether civilians or military or navy personnel did the actual work."

It should be noted that in neither of these cases are there any shipments for the Maritime Commission. The shipment of copper cable was for use in the installation of degaussing equipment on a cargo vessel. It should be noted that this copper cable was purchased by the Navy Department, consigned to one of its officers and supplied pursuant to Navy specifications.

It is true that the Northern Pacific decision contains dicta in regard to shipments of materials for construction of ships for the Maritime Commission. The decision stated that to be "military or naval" did not require that the materials be procured by the War or Navy Departments, but they could be procured by the Maritime Commission for cargo and transport vessels. The decision also stated property covered by the exception in Section

321(a) was not confined to property for ultimate use directly by the armed forces but would include materials shipped for the construction of vessels for the Maritime Commission to be used to service troops at home or abroad.

Not even the dicta of the Northern Pacific decision states that all property of the Maritime Commission is "military or naval property moving for military or naval and not for civil use." It is therefore, necessary to determine the intended use of the shipments involved in this action.

II.

Materials in This Case Were Not Military or Naval Property Moving for Military or Naval and Not for Civil Use Within the Meaning of Section 321(a).

(a) Use for Which Materials Shipped in This Case Were Intended.

The materials forming the basis of this action were purchased for use in the construction of ships, authorized and the funds for which were appropriated by Public Laws 5, 23, 247 and 630, 77th Congress. In each case these laws provided that the ships were to be of such type, size and speed as the Commission may determine. Public Law 5 referred to "ocean-going cargo vessels . . . useful in time of emergency for carrying on the commerce of the United States, and to be capable of the most rapid construction." Public Law 23 made appropriations to enable the President, through such departments or agencies of the Government as he may designate, to carry out the provisions of the Lend-Lease Act. Among these appropriations was an appropriation for "vessels, ships,

boats and other watercraft and equipage, supplies, materials, spare parts and accessories." Pursuant to Public Law 23, the President authorized the Maritime Commission to enter into commitments for the construction of vessels similar to those authorized by Public Law 5. Public Laws 247 referred to "merchant vessels . . . useful for carrying on the commerce of the United States and suitable for conversion into naval or military auxiliaries." Public Law 630 appropriated funds to increase the construction fund established by the Merchant Marine Act of 1936, and provided that this construction fund should be available for carrying out the activities and functions which the Commission is authorized to perform under Public Law 247.

As to each of these appropriations, the Maritime Commission determined to construct Liberty ships. The reasons for the construction of these ships, and some of their characteristics, are given in the following excerpts from Congressional Committee hearings and reports on the bills enacted into Public Laws 5 and 247: House of Representatives Report No. 10, January 22, 1941, on House Joint Resolution 77, which became Public Law 5, on pages 3-4, stated as follows:

> "The American tonnage in normal times has not been adequate to carry the proportion of our foreign trade that should be transported in vessels of our flag. During the calendar year 1939, approximately 25 percent of the waterborne foreign commerce of the United States (exclusive of tanker traffic) was carried in our ships and 75 percent in vessels of foreign registry; about 34 percent of the total was carried in vessels of British registry.

"There has been a serious depletion of world tonnage due to the war. According to figures furnished the committee, 1,371 ships of five and one-half million gross tonnage have been lost between September 3, 1939, and January 1, 1941. While new tonnage has been added, the threat of a shortage and its effect on our commerce exists. The destruction of such a large volume of foreign tonnage, the diversion of a substantial volume of foreign tonnage for carrying commerce in world trade to specific national uses under war conditions, the internment of considerable tonnage of nations not directly at war, and the congestion of shipyards with combatant ships, have all had the effect of decreasing the reserve tonnage of the United States.

"Some ships constructed by the Maritime Commission for the American Merchant Marine instead of reaching or remaining in the mercantile traffic have been taken and are being taken as auxiliaries for the Navy and some have been taken for Army requirements. These ships were constructed under the Merchant Marine Act with Government aid and were designed for use in emergency as naval auxiliaries and the wisdom of that policy is finding fruit in having suitable vessels of the type required for the Navy. In addition to vessels taken by the Army and Navy from among those produced under the regular Commission program, other vessels have been acquired for those services and the total number of ships taken by both services is 62. With the demand already heavy for Navy purposes, the development of the two-ocean Navy will place a further burden on ships produced in the future under the Commission's regular program.

"The prevalence of war conditions necessitates much of the merchant tonnage traveling longer routes

than the normal channels of trade follow and the consequence of this procedure is the need for more tonnage for some voyages due to the longer turn-around time of the ships.

"The increased trade with South American countries as the result of the elimination of certain foreign competitors by the war and the diversion of foreign-flag tonnage from the carrying trade to those countries also contribute to our need for emergency tonnage. Our commerce has also increased in other parts of the world where our ships are permitted to ply.

"The defense requirements of the United States, particularly in the importation of strategic and critical materials from various parts of the world have placed a burden on our mercantile shipping that is being very definitely and increasingly felt.

"A number of ships have transferred their registry from American to foreign and a large tonnage, represented principally by ships that were not salable in normal times but now in demand, has been sold and gone to foreign registry.

"All of the factors enumerated have operated to produce a situation in the American merchant marine which Admiral Land has advised the committee will result in a serious shortage of tonnage in the near future unless a program of the character recommended in the joint resolution is adopted.

"A factor for consideration, though not contributing to the immediate necessity, is the condition of the ships in the coastal trade. The average age of these vessels is 20 to 25 years and they will need to be replaced in 4 or 5 years by ships suitable for that service. The utility of some of the emergency cargo vessels in this trade after the emergency has passed has possibilities.

"The construction program consists of a total of 200 emergency type steel cargo ships of 7,500 gross tons each of box shaped uniform design, speed of 10 or 11 knots per hour, equipped with 2,500-horsepower reciprocating engines, steam auxiliaries, and oil-burning water-tube boilers. The design of the ships has been made as simple as possible by eliminating much electrical equipment and reducing the number of castings, forgings, etc., to a minimum in order to produce, quickly and without interference with the naval construction program and the regular merchant-ship program, cargo vessels that are essential in the emergency. The total gross tonnage will be 1,500,000."

The passage of Public Law 5 was primarily the result of a communication from Franklin D. Roosevelt, President of the United States, dated January 16, 1941, addressed to Congress, and which is referred to as House Document No. 51. The first few sentences of this communication state as follows:

"I am convinced that the national interest demands that immediate steps be taken upon an emergency basis to provide against the effect upon the United States of a possible world shortage of cargo vessels.

"Therefore, I feel that there should be undertaken with the least possible delay the construction of not less than 200 steel cargo vessels, suitable for use in the present emergency and of such type and design as will permit of their most rapid construction.

"Such a program of emergency shipbuilding should be entirely distinct from the long-range construction program with which the United States Maritime Commission is proceeding under the 1936 Merchant

Marine Act, and interference with that program, *as well as interference with the naval construction program, must be avoided.*"

It will be noted that in the above communication, the President considers the naval construction program to be something entirely different from the construction program under the supervision of the Maritime Commission.

As further indicating the expectation that these ships would be devoted primarily to purposes of commerce rather than of war, there have been noted the views expressed in the following excerpts from the hearings before the subcommittee of the Committee on Appropriations, House of Representatives, in connection with House Joint Resolution 77, which became Public Law 5:

"Page 4:

"Admiral Land. This particular appropriation covers 200 ships.

"Mr. Johnson of West Virginia. What are you going to do with them?

"Admiral Land. We are going to operate them.

"Mr. Ludlow. Would they be held in reserve for any particular purpose, Admiral?

"Admiral Land. I would say they would be held in reserve for the transportation of American commerce. Where they would be operated it would be useless for me to attempt to predict, because these ships will not be available for some time. The first ship, we estimate, will be completed in 11 months after the date of the contract, and the total program will be completed in 24 months after the date of the contract.

"Page 5:

"Mr. Cannon. What comparison is there in need and circumstances and purpose, as between these ships and the wooden ships built during the World War?

"Admiral Land. I do not think there is any proper basis of comparison between these and the wooden ships, because these are so far superior to the wooden ships, in carrying capacity and other ways.

"Mr. Cannon. Are they being asked for the same purpose?

"Admiral Land. I would say, generically they are, with this modification. The wooden ships and the concrete ships in the last war were built for what is generically known as the bridge of ships between here and Europe. There is no such purpose in this, as far as my knowledge goes. There were some 2,300 vessels built for this bridge of ships, and here we are talking about 200 ships. There is no comparison.

"Mr. Cannon. They are not being requisitioned for the same purpose?

"Admiral Land. No; as far as my knowledge goes they are for American Commerce.

"Page 11:

"Mr. Ludlow. Will they be used exclusively for American commerce, or will they be used in cooperation with Great Britain?

"Admiral Land. They would be more for the transportation of American commerce. As I have indicated, there is a probable use for them in the intercoastal and domestic trade, in which they would be superior to what we have now. As to what may happen to them after that, I would not want to prophesy."

House of Representatives Report No. 988 of Committee on Appropriations, July 24, 1941, 77th Congress, on the First Supplemental National Defense Appropriation Bill, 1942, which became Public Law 247, stated as the reasons for the need of additional ships, pages 8-9:

"When the emergency cargo-ship construction program of 200 vessels was presented in January of this year it was believed that the tonnage to be procured thereby, in addition to the tonnage in the regular program of the Commission, would supply the deficiency in merchant ship tonnage that would develop by 1942. The shipping situation, however, both as to our own needs and the needs of the nations whose defense is deemed vital to the defense of the United States, has become serious much sooner than could have been anticipated at the time the emergency program was originated. The Lend-Lease Act of March 11, 1941, has resulted in a very considerable need for increased tonnage in the merchant marine.

"Some of the factors entering into a determination of the need for additional tonnage are as follows:

"(1) The withdrawal or imminent withdrawal of 100 ships, totaling approximately 1,000,000 tons, from the domestic trade for the Red Sea service for Great Britain.

"(2) The withdrawal of Norwegian, Dutch, and other allied ships from the Western Hemisphere for British use in the North Atlantic leaving a deficiency in our own essential services to the Orient and South America.

"(3) The furnishing of approximately 2,300,000 tons of shipping for delivery of goods transferred under the lend-lease program for North Atlantic service to carry war materials to Great Britain. Such vessels operate under foreign flag but come from the

American merchant fleet and reduce the tonnage available for our own imports by the same amount.

"(4) The tanker shuttle service operating under lend-lease has taken approximately 600,000 tons from the domestic tanker fleet.

"(5) Aid to China is estimated to require 450,000 tons of shipping in the fiscal year 1942.

"(6) Since the outbreak of the European War, 111 vessels, aggregating 1,117,977 tons, have been acquired by, or are now under construction for, the Army and Navy and further requirements are to be expected as military needs increase.

"(7) The Army estimates it will require the shipment of 1,654,000 more tons of cargo to United States bases outside continental United States than can be handled by the Army transport service.

"(8) Reliable estimates place the losses of British, Allied, and neutral shipping sunk prior to July 9, 1941, at 9,500,000 dead-weight tons.

"(9) Estimates prepared by O. P. M. and O. P. A. C. S. indicate that American vessels should be made available to import approximately 34,000,000 tons of defense and civilian commodities during the present fiscal year. This represents an increase in imports of 45 percent over 1939 when only one-fourth of our imports were carried in American-flag vessels. Practically all of this 34,000,000 tons, if imported, must be brought in American ships. This burden thrown on the American fleet for defense and civilian requirements is roughly five times as much as was carried in American ships in 1939."

In regard to the proposed method of operation of these ships, the following portion of the hearings, August 9, 1941, before the Subcommittee of the Committee on Ap-

propriations, United States Senate on First Supplemental National Defense Appropriation Bill for 1942, which became Public Law 247, gives some information, printed report of hearings, page 241:

"Admiral Land (Chairman, United States Maritime Commission). As far as we can see, we hope not to operate ships, for two reasons: One is that we have the directive from Congress that the American merchant marine shall be privately operated, if at all practicable; and secondly, we haven't the proper operating personnel and could not get it without making a tremendous expansion and encroaching upon private business. So that our policy is to charter to operators, giving preference to operators who have operated under the American Flag and who have made direct and indirect contributions, and who have cooperated in the matter of ships, personnel, and everything pertaining to shipping operations in the all-out national-defense picture.

"In other words, the company which has gone in with us and built ships—and then the Army comes along and takes the ships—we feel in justice to such a company that it should have preference or preferential treatment in the chartering of such ships as we are able to obtain by law.

"Senator Adams. When you use the term 'charter,' you mean a transfer of ownership, do you?

"Admiral Land. No, sir. It is just like renting a house.

"Senator Adams. The reason I asked you is that I understood you to say you did not have the ownership of any ships.

"Admiral Land. When I say we don't own any ships, I should probably correct that by saying that these foreign-flag ships—German and others, which

have been sabotaged—we are seizing those ships and therefore they are under American ownership and the title is in the Maritime Commission.

"Senator Adams. I am thinking just in terms of the ships you are building.

"Admiral Land. No, no. We own them only as we build them, and sell them, most of the time, during course of construction to private operators."

Later, on page 249 the following is reported:

"Senator Thomas. Do you have prospective buyers for all the ships building?

"Admiral Land: In so far as the standard program, yes, sir; in so far as the emergency program, no sir.

"Senator Thomas. What happens when you build a ship and there is no buyer for it?

"Admiral Land. We charter it or operate it, if necessary.

"Senator Thomas. How many ships are you operating now?

"Admiral Land. None.

"Senator Thomas. So far, then, you have been lucky or successful in disposing of your merchandise?

"Admiral Land. That is a fair way of stating it, Senator."

Most of the Liberty ships were operated as merchant vessels under the direction and control of the War Shipping Administration through agency agreements with private operators. [R. 20.] There is no showing that any of the ships constructed with the materials in question were used other than as merchant vessels.

(b) The Maritime Commission Under Merchant Marine Act of 1936 and the Appropriations Under Which the Ships in Question Were Constructed.

The United States Maritime Commission was created by the Merchant Marine Act, 1936 (see 46 U. S. C. A., Secs. 1101, *et seq.*).

The declaration of policy of the Merchant Marine Act, 1936 is contained in Section 1101 of 46 U. S. C. A., which is as follows:

> "It is necessary for the National defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times; (b) capable of serving as a naval and military auxiliary in time of war or national emergency; (c) owned and operated under the United States flag by citizens of the United States, in so far as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such merchant marine. June 29, 1936, c. 858, Title I, §101, 49 Stat. 1985."

This policy is further emphasized by the provisions of Section 1120 of 46 U. S. C. A., which is as follows:

> "It shall be the duty of the Commission to make a survey of the American merchant marine, as it now

exists, to determine what additions and replacements are required to carry forward the national policy declared in Section 1101 of this title, and the Commission is directed to study, perfect, and adopt a long-range program for replacements and additions to the Amercan merchant marine, so that as soon as practicable the following objectives may be accomplished:

"First, the creation of an adequate and well-balanced merchant fleet, including vessels of all types, to provide shipping service on all routes essential for maintaining the flow of the foreign commerce of the United States, the vessels in such fleet to be so designed as to be readily and quickly convertible into transport and supply vessels in a time of national emergency. In planning the development of such a fleet the Commission is directed to cooperate closely with the Navy Department as to national defense needs and the possible speedy adaptation of the merchant fleet to national-defense requirements.

"Second, the ownership and the operation of such a merchant fleet by citizens of the United States in so far as may be practicable.

"Third, the planning of vessels designed to afford the best and most complete protection for passengers and crew against fire and all marine perils. June 29, 1936, c. 858, Tile II, Sec. 210, 49 Stat. 1989."

By Section 1116, a construction fund is created which shall be "maintained as a revolving fund . . . and shall be available for expenditure by the Commission in carrying out the provisions of this chapter."

The fund established by Section 1116 of 46 U. S. C. A. is referred to as "69X0200 Construction Fund, U. S. Maritime Commission Act of June 29, 1936 Revolving Fund." [R. 22.]

By the Act of February 6, 1941, Public Law 5, there was created the "Emergency Ship Construction Fund, United States Maritime Commission." This fund was created for the purpose of providing as rapidly as possible cargo ships essential to the commerce and defense of the United States, which fund was to be available for the payment of contract authorizations for the construction in the United States of ocean-going cargo vessels of such type, size and speed as the Commission may determine to be useful in time of emergency for carrying on the commerce of the United States and to be capable of the most rapid construction, and for the purpose of carrying out the provisions of the Merchant Marine Act of 1936 as amended. This fund is known as "69X0201 Emergency Ship Construction Fund, U. S. M. C." [R. 22.]

The third fund from which the construction of the ships in question was paid for was the fund established under the Act of March 27, 1941, Public Law 23, which is known as the "Defense Aid Supplemental Appropriation Act, 1941." This act was passed for the purpose of making appropriations to carry out the Lend-Lease Act (Act of March 11, 1941). The Lend-Lease Act was passed to provide aid to the government of any country whose defense the President deemed vital to the defense of the United States. By Public Law 23, an appropriation was made among other things, for "vessels, ships, boats and other watercraft and equipage, supplies, materials, spare parts and accessories." The fund authorized under this appropriation is known as "69X-111/30023 Defense Aid, Vessels and Watercraft (Allot. to U. S. Mar. Com.) 1941-1943." [R. 22.]

Public Law 247 made appropriations to increase the construction fund established by the Merchant Marine Act, 1936 (46 U. S. C. A. 1116) and provided that "there may be transferred from this appropriation to the 'Emergency Ship Construction Fund, United States Maritime Commission,' created by said Act of February 6, 1941 (Public Law 5) such amounts as the Commission may deem necessary for the completion of the program authorized by said Act."

Public Law 630 appropriated funds to increase the construction fund established by the Merchant Marine Act, 1936, and provided that this construction fund should be available for carrying out the activities and functions which the Commission is authorized to perform under Public Law 247.

In other words, all the appropriations for the ships in question were made either to carry out the objects and purposes of the Merchant Marine Act of 1936, or Public Law 5, or of the Lend-Lease Act. It appears that of the disputed freight charges, $5,688.02 covered by freight bills No. F-18436-3 and No. F-21750-7, was chargeable to the Maritime Commission Revolving Fund created by the Act of June 29, 1936, Section 1116 of 46 U. S. C. A. Of the remaining disputed freight charges, $1.836.28 was payable from the Emergency Ship Construction Fund created by the Act of February 6, 1941, Public Law 5 of the 77th Congress, and $1,419.52 was payable from the Defense Aid, Vessels and Watercraft Fund created by the Act of March 27, 1941, Public Law 23 of the 77th Congress, which was to carry out the purposes of the Lend-Lease Act.

The Stipulation of Facts provides that the materials shipped were purchased with funds from the same appropriations as the appropriations from which the freight charges were paid. [R. 21.] Therefore, the shipments covered by freight bills No. F-18436-3 and F-21750-7 were purchased from the Maritime Commission Revolving Fund, and the remaining shipments were purchased from the other two funds mentioned.

(c) What Shipments by the Maritime Commission Are "Military or Naval" and What Shipments Are Civil?

The Supreme Court has stated in the decision in the *Northern Pacific* case that the activities of the Maritime Commission can be "military or naval" within the meaning of Section 321(a). The activities of the Maritime Commission more frequently are civil activities. The question is under which of these classifications the shipments of materials in this case should be classed.

At the start, the position taken by the Maritime Commission should be mentioned. It appears that the first official action taken by the Maritime Commission claiming that shipments for the construction of its vessels were "military or naval" was the resolution of December 4, 1942. [R. 72-75.] By this resolution, it was "determined" that as of December 8, 1941 all shipments for the construction of vessels by the Maritime Commission "upon passage of title to the Government after said date of December 8, 1941, military or naval property of the United States and upon shipment moved for military or naval and not for civil use." [R. 75.] Subsequently, by resolution of July 2, 1946, the Maritime Commission "determined" that property of the Maritime Commission when shipped

after September 1, 1945 "should not be regarded as military or naval property of the United States moving for military use." [R. 76-77.]

It should be noted that at least one case has drawn the dividing line at a different place than drawn by the Maritime Commission.

In the case of *St. Johns River Shipbuilding Co. v. Adams,* 164 F. (2d) 1012 (December 12, 1947, C. C. A. 5th Cir.), the Court held that employees engaged in building Liberty ships for the Maritime Commission were engaged in production of goods for commence under the Fair Labor Standards Act, but that employees engaged in construction of tankers were not engaged, the Court stated, pages 1014-1015:

> "These employees were found to be employed in building ships and doing work essential to that end. Ships are by the definition of the statute included among 'goods.' Sect. 3(i), 29 U. S. C. A., §203(i). Ships which are to be used as vehicles of interstate and foreign transportation are fairly 'goods for commerce,' for the statute, Sec. 3(b), and the Constitution include transportation as commerce. There would be no difficulty save for the fact of war, declared in December, 1941. Yet war does not stop all commerce nor suspend the laws regulating commerce. Goods, including ships, may still be produced for commerce, and we think the Liberty Ships were so produced. The Maritime Commission, normally a peace time agency, made the contracts for these, the contracts reciting as their authority Act No. 247, Aug. 25, 1941, of the 77th Congress, 55 Stat. 669, 681, authorizing it to contract for 'merchant vessels of such type, size, and speed as [it] may determine to be useful for carrying on the commerce of the

United States and suitable for conversion into naval or military auxiliaries.' The contracts state that the vessels ordered are such vessels. The evidence shows no different purpose in producing them. The Interpretive Bulletin No. 5 of the Wage and Hour Division of the Department of Labor issued in December 1938, revised November, 1939, state: 'Employees are engaged in the production of goods for commerce where the employer intends or hopes or has reason to believe that the goods or any unsegregated portion of them will move in interstate commerce. * * * The facts at the time the goods are being produced determine whether an employee is engaged in the production of goods for commerce, and not any subsequent act of his employer, or some third party.' Thus the agreed purpose of these ships was primarily commerce, with only a possibility of utilizing them later for war. As the intentions of the owner and builder stood at the time of construction they appear to have been ships produced for commerce.

"The tanker contract is different. The Maritime Commission there recites as its Congressional authority Act No. 70 of the 78th Congress, approved June 14, 1943, 57 Stat. 151, and Presidential action directing the construction of vessels of the type described in the contract. The defense of the United States is the theme of this Act, and of that which it supplements, Act March 11, 1941, 55 Stat. 31, 22 U. S. C. A., §411 *et seq.*; and commerce is not mentioned.

The evidence is that these tankers were of relatively small size, intended to be used in the fighting in the Pacific in hopping from island to island, to carry fuel from the naval bases to the naval vessels and the soldiers at the fighting front. They were not fitted out and equipped as commercial vessels would have to be to obtain a certificate from the Coast Guard, having 45 defects, including want of proper quarters for crews, and equipment for safety, so that only crews from the navy could operate them under a special permit. They were turned over directly to the navy at the Company's dock. They became 'expendibles' at the battle front. They were goods produced for war, not for commerce. War is not commerce. There can be commerce in war equipment, but when the government itself in the midst of war has produced for immediate use in war at its own expense and in its own shipyard special type vessels as auxiliaries for its navy and to be manned by navy crews, commerce is not involved at all. The Company and its employees knew it was not. The war power of the federal government is its supreme power. When it is in action it is transcendent. This work was not the time and place to bicker about overtime. The men who manned these boats got no overtime. They staked and often lost their lives.

"There is evidence that these tankers can be altered for business use. But it is also testified that not one has found a purchaser since the fighting ceased. It remains true that at the time they were produced

they were for war and not commerce. What may possibly be done with them in the future is irrelevant. Work done on these tankers is not under this Act."

It is to be noted that the ships other than tankers being constructed by the employees referred to in the above case were constructed under Act No. 247 of August 25, 1941, 77th Congress, which is one of the acts under which the vessels in this case were being constructed.

A somewhat different method of determination of this question has been given by the Comptroller General in an opinion dated August 15, 1941 which is reported in 21 Comp. Gen. Op. 137. This opinion was given in response to a letter from the Maritime Commission requesting the status under the Transportation Act of 1940 of shipments by rail for use in the construction of ships under Public Law 5 of the 77th Congress and the Lend Lease Act. A copy of this opinion is set forth in the Appendix, but the following is the conclusion of the Comptroller General:

"Therefore, viewing your question in the light of the purposes to be served, so far as is discernible from the legislation under which it appears the vessels are to be constructed, it would seem reasonably clear that while the construction of the vessels for which provision is made in the joint resolution of February 6, 1941, may have resulted from, or may have been necessitated by, the demands arising under the national defense program, the primary purpose of said joint resolution was to provide said ships as a means of preserving or furthering the interests of the com-

merce of the United States and to augment the depleted facilities available for that purpose, replacing vessels withdrawn from said service because of the demands of defense. On the other hand, in the Act to Promote the Defense of the United States and in the Defense Aid Supplemental Appropriation Act, 1941, the emphasis seems to be placed principally upon the rendering of direct aid in resistance to military aggression, though it is conceivable at least, that in some instances articles authorized to be manufactured or produced under said acts might be put, as a matter of defense, to a use not directly connected with military operations. Within the scope of these objectives, it is realized that there is possible a wide variation in the purpose to be served through the use of cargo vessels, ranging from the carrying of munitions and supplies for direct consumption by military forces to the theatre of war, on the one hand, to the transportation of cargoes for domestic consumption, related, as a matter of defense, to military operations only remotely, if at all, on the other. The question as to whether the materials to be procured for the construction of the cargo vessels here concerned under either act are to be directed to the accomplishment of the one or the other of these purposes is a question of fact concerning which information, initially at least, would seem to be an exclusive possession of the administrative agencies involved. The administrative determination, therefore, that the transportation involved in any particular instance embraces materials moving for military or naval and not for civil use

will be given appropriate consideration. Having regard, however, to the purpose or use apparently intended to be served by the legislation concerned, it is believed that with respect to the materials for the construction of the cargo vessels authorized under the joint resolution of February 6, 1941, this office would not be required to object to the payment of transportation charges without deduction for land-grant in the absence of an administrative determination that, under the particular facts that may be involved in any instance, said materials are being transported for military or naval and not for civil use. Likewise, with respect to the materials for the construction of cargo vessels pursuant to the authorizations in the Act to Promote the Defense of the United States and the Defense Aid Supplemental Appropriation Act, 1941, if it be administratively determined that said vessels are to serve the purposes of commerce—as a matter of defense—rather than to participate in the carrying of supplies for military purposes, and that, therefore, the transportation of materials for their construction is regarded as involving materials moving for civil rather than military or naval use, the administrative certification accordingly will be accepted by this office as *prima facie* correct."

(d) Time When Character of Shipments Is to Be Determined.

The rates applicable to a shipment are determined as of the time the shipment is delivered to the carrier. It is, therefore, necessary to examine the situation as it then exists to determine the character of the shipment and the proper rate applicable.

Attached is a statement showing as to all the shipments involved in this action, the freight bill number, the numbers and date of the bill of lading, the number and date of the contract for the purchase of the materials, the date of the consignment, the date of delivery, the number and date of the contract for construction of the vessels for which the materials were to be used, and the act and date of the act under which the appropriations were made for the construction of the ships. This information was assembled from the Stipulation of Facts. [R. 14-39.]

From the attached statement, it appears that most of the acts appropriating funds for the construction of the ships, most of the contracts for the construction of the ships, most of the contracts for the purchase of the materials shipped, and most of the bills of lading are dated prior to December 8, 1941.

Viewing the situation as of the time of shipment, the best way of determining the character of the shipments is by the purpose for which the vessels were to be constructed as shown by the Acts which appropriated the funds for their construction. The particular provisions of these acts, as well as the hearings prior to their enactment, indicate that these vessels were to be used primarily for commerce and not primarily for military or naval purposes.

Freight Bill Number	Bill of Lading Number	Date	Materials Purchase Contract No.	Date	Date of Consign-ment	Date of Delivery	Ship Contract Number	Date	Public Law Number	Date
F-18436-3	MC-218872	9-23-42	CD-MC-42-110 (MC-3173)	12-12-41	1-26-43	3-12-43	MCc-13097	12-24-42	247 630	8-25-41 6-27-42
F-10611-1	MC-21162	9-27-41	MCc-(ESP)-1008	4-14-41	12-16-41 12-17-41	1-20-42	MCc-7785	3-14-41	5	2-6-41
F-10503-12	MC-88579	11-25-41	MCc-(ESP)-1520	8-12-41	12-9-41	12-29-41	MCc-7785 MCc-7786	3-14-41 5-1-41	5 23	2-6-41 3-27-41
F-10610-1	MC-22992 MC-19113	10-3-41 9-19-41	MCc-(ESP)-1145 MCc-(ESP)-1016 MCc-(ESP)-1083	6-20-41 4-16-41 5-17-41	12-29-41 1-6-42	1-23-42 1-23-42	MCc-7785 MCc-7786	3-14-41 5-1-41	5 23	2-6-41 3-27-41
F-10540-1	MC-28270 MC-34759	10-13-41 12-11-41	MCc-(ESP)-1837 MCc-(ESP)-2690	9-8-41 11-27-41	12-21-41 12-22-41	1-6-42 1-8-42	MCc-7785 MCc-7786	3-14-41 5-1-41	5 23	2-6-41 3-27-41
F-21750-7	MC-411214 MC-411234 MC-411239 MC-411273	4-6-43	MCc-(ESP)-730 PD-MC-43-10664	3-4-43	5-16 to 5-31-43	6-14 to 6-23-43	MCc-13097	12-24-42	247 630	8-25-41 6-27-42
F-10535-1	MC-16624 MC-16623 MC-16626 MC-16627 MC-16629	9-3-41	MCc-(ESP)-1028	4-16-41	12-17-41 to 1-1-42	1-3-42 to 1-9-42	MCc-7785	3-14-41	5	2-6-41
F-11274-4	MC-37295 MC-37321 MC-37322 MC-37325 MC-37326	12-18-41	MCc-(ESP)-1020	4-16-41	2-23-42 to 4-6-42	4-18-42 to 4-20-42	MCc-7785	3-14-41	5	2-6-41

(e) Summary of Reasons Why Materials in This Case Were Not Military or Naval Property Moving for Military or Naval and Not for Civil Use Within the Meaning of Section 321(a).

As has been stated, the only information at the time of shipment as to the use of the materials shipped were that they were to be used for the construction of ships constructed under Public Laws 5, 23, 247 and 630 of the 77th Congress. These laws indicated primarily that these ships were being constructed for carrying on the commerce of the United States. Public Law 5 authorized the construction of ocean-going cargo vessels of "such type, size, and speed as the Commission may determine to be useful in time of emergency for carrying on the commerce of the United States and to be capable of the most rapid construction." While Public Law 23 does not provide what kind of ships should be constructed, the President "authorized the Commission to enter into commitments for the construction of emergency type vessels similar to those which the Commission is authorized to construct under 'Public Law 5.'" [R. 16.] Therefore, the vessels constructed under Public Laws Nos. 5 and 23 were constructed for carrying on commerce.

Public Laws Nos. 247 and 630 made appropriations to the construction fund established by the Merchant Marine Act, 1936. The appropriations made by these acts, unless transferred to the Emergency Construction Fund established by Public Law 5, were for use in constructing merchant vessels "useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries." [R. 17-18.] In other words, these vessels were constructed as merchant vessels, but of such size, etc., "suitable for the conversion into

naval or military auxiliaries." This is in accordance with the general policy of the Maritime Commission, as established in the Merchant Marine Act, 1936, and set forth in Sections 1101 and 1120 of 46 U. S. C. A., *supra.* These provisions were applicable to all ships constructed by the Maritime Commission and in no way indicate an intention to actually use the vessels as naval or military auxiliaries. In this case there is no showing of any intention that the ships in question would be so converted, nor any evidence that they were in fact so converted. The Stipulation of Facts states that the shipments comprised materials for use in construction of vessels (Liberty Ships) built by the California Shipbuilding Corporation for the United States Maritime Commission. [R. 14.]

The reports to Congress prior to the passage of these acts indicated that the use of the ships constructed under these acts was to be primarily for carrying on commerce. The testimony of Admiral Land further indicated that this was the primary purpose of the construction of these ships.

The case of *St. Johns River Shipbuilding Co. v. Adams,* 164 F. (2d) 1012, *supra,* held that ships constructed under Public Law 247 of the 77th Congress were primarily for commerce and were to be placed in a different classification than tankers being constructed primarily for war purposes which was not commerce.

The opinion of the Comptroller General given August 15, 1941 stated that in his opinion, ships constructed under the Public Law No. 5 of the 77th Congress was

primarily for preserving and furthering the interest of the commerce of the United States.

For all these reasons, it must be concluded that as the materials being shipped in this action were to be used for vessels to be constructed primarily for commerce, these shipments were not military or naval property moving for military or naval and not for civil use within the meaning of Section 321(a) of the Transportation Act of 1940.

III.

The Trial Court Properly Held for Pacific Electric Railway Company as to Certain of the Shipments as Title Was Not in the United States at the Time of Shipment.

The exception in Section 321(a) applies to "property of the United States." In order to be "property of the United States" under this section, it is well settled that title to the property shipped must be in the United States at the time of shipment.

United States v. Galveston, Harrisburg & San Antonio Railway Company, 279 U. S. 401, 73 L. Ed. 760 (May 13, 1929);

Oregon-Washington Railroad & Navigation Company v. United States, 225 U. S. 339, 65 L. Ed. 667 (March 7, 1921);

Henry H. Cross Co. v. United States, 133 F. (2d) 183 (7th Cir.) (Feb. 3, 1934);

Illinois Central Railroad Company v. United States, 265 U. S. 208, 68 L. Ed. 983 (May 26, 1924);

Louisville & Nashville Railroad Company v. United States, 267 U. S. 395, 69 L. Ed. 678 (March 2, 1925).

The particular shipments as to which title was not in the United States at the time of shipment are the following:

Carrier's Bill Number	Bill of Lading Number	Purchase Contract Number	Amount in Dispute
F-10503-12	MC-88579	MCc-(ESP)-1520	$ 321.02
F-10610-1	MC-22992	MCc-(ESP)-1145	201.89
F-10540-1	MC-28270	MCc-(ESP)-1837	420.02
	MC-34759	MCc-(ESP)-2690	200.73
		Total	$1,143.66

Contracts MCc-(ESP)-1520 and MCc-(ESP)-1145 each provided that "Title to all of the products covered by this order will remain in the Seller until delivery thereof has been made to the Buyer at the destination herein named."

Contracts MCc-(ESP)-1837 and MCc-(ESP)-2690 each provided "The goods covered herein are the property of the Seller until delivered to the Buyer at the Buyer's fabricating point herein specified and shall not be diverted or reconsigned without permission of the Seller."

It will be noted that in each of the above cases there was an express provision in the contract that title remain in the seller until delivery of the goods. This clearly shows that title was not in the Government during the time of shipment as to any of these shipments.

The Government, apparently, takes the position that in spite of these clear contract provisions, that title was in the Government during the time of shipment because shipment was to be on Government bill of lading. Where

there is no provision in the contract as to title, it has been held that where the contract provides for shipment on Government bill of lading, that is some indication that title would pass to the Government at the time of shipment.

Illinois Central Railroad Company v. United States, 265 U. S. 208, 68 L. Ed. 983 (May 26, 1924);

Louisville & Nashville Railroad Company v. United States, 267 U. S. 395, 69 L. Ed. 678 (March 2, 1925).

On the other hand, it has been held that the mere use of Government bills of lading does not show that title is in the United States. In the case of *Louisville & Nashville Railroad Company v. United States,* 267 U. S. 395 at 402, it is stated:

> "The conclusion that the coal furnished the Tonopah was to be delivered at the mine is not sustained by the facts found. Under the invitation to bid, proposal and acceptance, delivery was to be made alongside the vessel at Pensacola. The coal was transported on government bills of lading. The United States paid the freight, less land-grant deductions. The use of government bills of lading and the payment of reduced charges by the United States are not sufficient to sustain a finding that the coal was the property of the United States when hauled by appellant. There is nothing to indicate that title passed before delivery at the vessel."

See, also:

Henry H. Cross Co. v. United States, 133 F. (2d) 183 at 186.

Therefore, as to the above mentioned shipments the Government can in no event claim the benefit of land-grant rates as the property shipped was not "property of the United States" within the meaning of Section 321(a).

Conclusion.

It is, therefore, submitted that the District Court erroneously found that the shipments involved in this action were military or naval property moving for military or naval and not for civil use, and should have granted plaintiff judgment for the full amount of $8,943.82.

It is further submitted that the District Court correctly found that as to shipments covered by bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759 title of the shipment was not in the United States at the time of shipment, and therefore, the United States was in no event entitled to land-grant rates as to these shipments.

Respectfully submitted,

FRANK KARR,
C. W. CORNELL,
E. D. YEOMANS,
Attorneys for Pacific Electric Railway Company.

APPENDIX.

1. Section 321(a) and (b) of the Transportation Act of 1940.

2. United States v. Powell, 91 L. Ed. 868, 330 U. S. 238, 67 S. Ct. 742.

3. Northern Pacific Ry. Co. v. United States, 91 L. Ed. 876, 330 U. S. 248, 67 S. Ct. 747.

4. Opinion of Comptroller General reported in 21 Corp. Gen. Op. 137.

1. TRANSPORTATION ACT OF 1940.

"Sec. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1(7) and 22 of the Interstate Commerce Act, as amended (49 U. S. C. A., §§1, 22), the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for

less than such rate: *Provided further,* That section 3709, Revised Statutes (U. S. C., 1934 edition, title 41, sec. 5), (41 U. S. C. A., §5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

"(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been here-

tofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law."

2. UNITED STATES v. POWELL, 91 L. Ed. 868, 330 U. S. 238, 67 S. Ct. 742, March 3, 1947.

These cases involve controversies between the United States and respondent carriers over the transportation charges for shipments of government property in 1941. In one case phosphate rock and superphosphate are involved; in the other, phosphate rock. In both the commodities were purchased by the United States, shipped on government bills of lading over the lines of respondents, and consigned to the British Ministry of War Transport. They were exported to Great Britain under the Lend-Lease Act of March 11, 1941, 55 Stat. 31, 22 U. S. C. Supp. I, §411 *et seq.*, for use as farm fertilizer under Britain's wartime program for intensified production of food. It is agreed that these shipments were "defense articles" as defined in §2 of that Act.[1]

Respondents billed the United States for transportation charges on these shipments at the commercial rate and were paid at that rate. The Seaboard is a land-grant railroad. The Atlantic Coast Line is not; but it entered into an equalization agreement with the United States in 1938 under which it agreed to accept land-grant rates for shipments which the United States could alternatively

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[1]The term includes "Any agricultural, industrial or other commodity or article for defense."

move over a land-grant road.[2] The General Accounting Office excepted to these payments on the ground that land-grant rates were applicable. The amounts of the alleged overpayments were deducted from subsequent bills concededly due by the United States. Respondents thereupon instituted suits under the Tucker Act, 36 Stat. 1091, 1093, as amended, 28 U. S. C. §41(20), to recover the amounts withheld. The United States counterclaimed for the difference between the amounts due under the commercial rate and those due under the land-grant rate and asked that the difference be set off against the claims of respondents and that the complaints be dismissed. The District Courts gave judgment for respondents. The Circuit Court of Appeals affirmed. (152 F. (2d) 228, 230.) The cases are here on petitions for writs of certiorari which we granted because of the importance of determining the controlling principle for settlement of the many claims of this character against the Government.

For years the land-grant rate was fifty per cent of the commercial rate and was applicable to the transportation of property or troops of the United States. 43 Stat. 477, 486, 10 U. S. C. §1375; *United States v. Union Pacific R. Co.*, 249 U. S. 354, 355; *Southern Ry. Co. v. United States*, 322 U. S. 72, 73. A change was effected

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[2]The points from which the phosphate was moved by the Atlantic Coast Line are also stations on the Seaboard Line. Hence the United States is entitled to secure land-grant deductions from the Atlantic Coast Line if the Seaboard would have been subject to land-grant rates on those articles.

Since the land-grant rates were substantially lower than the commercial rates, roads which competed with the land-grant lines were unable to get the government business. For that reason they entered into equalization agreements. See *Southern R. Co. v. United States*, 322 U. S. 72, 88 L. ed. 1144, 1146, 1147, 64 S. Ct. 869.

by the Transportation Act of September 18, 1940, 54 Stat. 898, 954, 49 U. S. C. §65. See *Krug v. Santa Fe Pac. R. Co.*, 329 U. S. ..... All carriers by railroad which released their land grant claims against the United States[3] were by that Act entitled to the full commercial rates for all shipments, except that those rates were inapplicable to the transportation of "military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty . . ." §321(a).[4] The Seaboard filed such a release. Accordingly, the question presented by these cases is whether the fertilizer was "military or naval property of the United States moving

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[3]Section 321(b).

[4]This provision was eliminated from §321(a) by the Act of December 12, 1945, 59 Stat. 606, c. 573, 49 U. S. C. A. §65(a), 10A F. C. A., Title 49, §65(a). Section 2 of that Act made October 1, 1946, the effective date of the amendment but provided that "any travel or transportation specifically contracted for prior to such effective date shall be paid for at the rate, fare, or charge in effect at the time of entering into such contract of carriage or shipment."

Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, who had charge of the bill on the floor, made the following statement concerning pending controversies of the nature involved in the instant cases:

> "Now, Mr. President, I wish to repeat what I said a moment ago. It should be made perfectly clear that the passage of this bill resulting in the repeal of the land-grant rates will have no effect whatever upon the controversies as to the proper classification of this material, provided it has moved prior to the effective date of the act. These controversies, which were discussed extensively at the hearings, will have to be settled by the courts; and action on the present bill, if favorable, will have no effect whatever upon the question of whether materials that have moved prior to the repeal fall within or without the classification of military or naval property." 91 Cong. Rec. p. 9237.

for military or naval and not for civil use" within the meaning of §321(a) of the Transportation Act.

The legislative history of the Transportation Act of 1940 throws no light on the scope of the except clause.[5] But it is apparent from the face of the statute that there are important limitations on the type of property which must be carried at less than the applicable commercial rates. In the first place, it is not the transportation of "all" property of the United States that is excepted but only the transportation of "military or naval" property of the United States. In the second place, the excepted property must be "moving for military or naval and not for civil use." Thus the scope of the clause is restricted both by the nature of the property shipped and by the use to which it will be put at the end of the transportation.

The bulk and main stress of petitioner's argument are based on the Lend-Lease Act which was enacted about six months after the Transportation Act. It is pointed out that in the case of every shipment under the Lend-Lease Act there was a finding by the Executive that the

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[5]See H. Rep. No. 2016, 76th Cong., 3d Sess., p. 87; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 93. Relief from land grant deductions was urged on the basis of the financial plight of the railroads and the substantial increase in government traffic which occurred in the 1930's. See Report of President's Committee of September 20, 1938, I hearings, House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., on H. R. 2531, pp. 261, 271-272; Public Aids to Transportation (1938), Vol. II, pp. 42-45. The section finally enacted appears to represent a compromise between a House Bill eliminating land-grant rates entirely (see H. Rep. No. 1217, 76th Cong., 1st Sess., p. 27) and a Senate Bill which by its silence left them unchanged. S. 2009, 76th Cong., 1st Sess.

shipment would promote our national defense,[6] that the Act was indeed a defense measure,[7] and that unless the administration of that Act is impeached, all lend-lease "defense articles" fall within the except clause and are entitled to land-grant rates.

Under conditions of modern warfare, foodstuffs lend-leased for civilian consumption, sustained the war production program and made possible the continued manufacture of munitions, arms, and other war supplies necessary to maintain the armed forces. For like reasons, fertilizers which made possible increased food production served the same end. In that sense all civilian supplies which maintained the health and vigor of citizens at home or abroad served military functions.

So for us the result would be clear if the standards of the Lend-Lease Act were to be read into the Transporta-

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[6]The authority was vested in the President who might, when he deemed it "in the interest of national defense," authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government to lease, lend, etc., "any defense article." §3(a)(2).

[7]The Act was entitled "An Act to Promote the Defense of the United States"; and the interests of national defense were the standards governing its administration, as §3(a)(2), *supra*, note 6, makes plain. The same purpose is evident from the Committee Reports. H. Rep. No. 18, 77th Cong., 1st Sess., pp. 2, 11; S. Rep. No. 45, 77th Cong., 1st Sess., p. 2. And as President Roosevelt stated on September 11, 1941, in transmitting the Second Report under the Act, "We are not furnishing this aid as an act of charity or sympathy, but as a means of defending America. . . . The lend-lease program is no mere side issue to our program of arming for defense. It is an integral part, a keystone, in our great national effort to preserve our national security for generations to come, by crushing the disturbers of our peace." S. Doc. No. 112, 77th Cong., 1st Sess., p. VI.

tion Act. For the circumstance that the fertilizer was to be used by an ally rather than by this nation would not be controlling.

Our difficulty, however, arises when we are asked to transplant those standards into the Transportation Act. And that difficulty is not surmounted though the exception in §321(a) be construed, as it must be, *Northern Pacific R. Co. v. United States,* No. 400, decided this day, strictly in favor of the United States.

In the first place, the Transportation Act, which preceded the Lend-Lease Act by only six months, provided its own standards. They were different at least in terms from the standards of the Lend-Lease Act; and they were provided at a time when Congress was much concerned with the problems of national defense. In September, 1940, when the Transportation Act was passed, Congress and the nation were visibly aware of the possibilities of war. Appropriations for the army and navy were being increased and the scope of their operations widened,[8] alien registration was required,[9] training of civilians for military service was authorized,[10] development of stock piles of strategic and critical materials was encouraged[11] —to mention only a few of the measures being passed

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[8]See, for example, Act of June 11, 1940, 54 Stat. 265, 292, 297; Act of June 13, 1940, 54 Stat. 350, 377, c. 343, Act of June 14, 1940, 54 Stat. 394, c. 364, 34 U. S. C. A. §498-1, 11 F. C. A., Title 34, §498-1; Acts of June 15, 1940, 54 Stat. 396, c. 365, 22 U. S. C. A. §521, 5 F. C. A., Title 22, §521, 54 Stat. 400, c. 375, 34 U. S. C. A. §749c-1, 11 F. C. A., Title 34, §749c-1; Act of June 26, 1940, 54 Stat. 599, c. 430.

[9]Act of June 28, 1940, 54 Stat. 670, c. 439, 8 U. S. C. §451 *et seq.*, 2 F. C. A., Title 8, §§451 *et seq.*

[10]Act of September 16, 1940, 54 Stat. 885, c. 720, 50 U. S. C. App. §301 *et seq.*, 11 F. C. A., Title 50, Appx. 5, §1.

[11]Act of September 16, 1940, 54 Stat. 897, c. 721, 15 U. S. C. A. §606d, 4 F. C. A., Title 15, §606d.

in the interests of national defense. See 50 Yale L. J. 250. Moreover, the realities of total war were by then plain to all. Europe had fallen; militarism was rampant. Yet in spite of our acute awareness of the nature of total war, in spite of the many measures being enacted and the many steps being taken by the Congress and the Chief Executive to prepare our national defense §321(a) of the Transportation Act was couched in different terms. In other parts of that Act,[12] as in many other Congressional enactments passed during the period, the exigencies of national defense constituted the standard to govern administrative action. But the standard written into §321(a) did not reflect the necessities of national defense or the demands which total war makes on an economy. It used more conventional language—"military or naval" use as contrasted to "civil" use. That obviously is not conclusive on the problem of interpretation which these cases present. But in light of the environment in which §321(a) was written we are reluctant to conclude that Congress meant "all property of the United States transported for the national defense" when it used more restrictive language.

In the second place, the language of §321(a) emphasizes a distinction which would be largely obliterated if the requirements of national defense, accentuated by a total war being waged in other parts of the world, were read into it. Section 321(a) uses "military or naval" use in contrast to "civil" use. Yet if these fertilizer shipments are not for "civil" use, we would find it difficult to hold that like shipments by the Government to farmers in this

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[12]Thus §1 emphasized the policy in establishing a national transportation system adequate, *inter alia,* to meet the needs "of the national defense."

country during the course of the war were for "civil" use. For in total war food supplies of allies are pooled; and the importance of maintaining full agricultural production in this country if the war effort was to be successful, cannot be gainsaid. When the resources of a nation are mobilized for war, most of what it does is for a military end—whether it be rationing, or increased industrial or agricultural production, price control, or the host of other familiar activities. But in common parlance, such activities are civil, not military. It seems to us that Congress marked that distinction when it wrote §321(a). If that is not the distinction, then "for military or naval and not for civil use" would have to be read "for military or naval use or for civil use which serves the national defense." So to construe §321(a) would, it seems to us, largely or substantially wipe out the line which Congress drew and, in time of war, would blend "civil" and "military" when Congress undertook to separate them. Yet §321(a) was designed as permanent legislation, not as a temporary measure to meet the exigencies of war. It was to supply the standard by which rates for government shipments were to be determined at all times—in peace as well as in war. Only if the distinction between "military" and "civil" which common parlance marks is preserved, will the statute have a constant meaning whether shipments are made in days of peace, at times when there is hurried activity for defense, or during a state of war.

In the third place, the exception in §321(a) extends not only to the transportation of specified property for specified uses. It extends as well to "the transportation of members of the military or naval forces of the United States (or of property of such members) when such

members are traveling on official duty. . . ." That clause plainly does not include the multitude of civilians employed by the Government during the war and exclusively engaged in furthering the war effort, whether they be lend-lease officials or others.[13] Thus, the entire except clause contained in §321(a) will receive a more harmonious construction if the scope of "military or naval" is less broadly construed, so as to be more consonant with the restrictive sense in which it is obviously used in the personnel portion of the clause.

In sum, we hold that respondents in these cases were entitled to the full applicable commercial rate for the transportation of the fertilizer. In *Northern Pacific R. Co. v. United States, supra,* we develop more fully the breadth of the category of "military or naval property" of the United States "moving for military or naval . . . use." It is sufficient here to say that the fertilizer was being transported for a "civil" use within the meaning of §321(a), since it was destined for use by civilian agencies in agricultural projects and not for use by the armed services to satisfy any of their needs or wants or by any civilian agency which acted as their adjunct or otherwise serviced them in any of their activities.

Affirmed.

Mr. Justice Rutledge dissents.

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[13]The provision under land-grant legislation that "troops of the United States" should be transported at half rates was held not to include discharged soldiers, discharged military prisoners, rejected applicants for enlistment, applicants for enlistment provisionally accepted, retired enlisted men, or furloughed soldiers en route back to their stations. *United States v. Union P.*, 249 U. S. 354, 63 L. ed. 643, 39 S. Ct. 294, *supra.* The same result was reached in the case of engineer officers of the War Department who were assigned to duty in connection with the improvement of rivers and harbors. *Southern P. Co. v. United States,* 285 U. S. 240, 76 L. ed. 736, 52 S. Ct. 324.

3. NORTHERN PAC. RY. CO. v. UNITED STATES, 91 L. Ed. 876, 330 U. S. 248, 67 S. Ct. 747, March 3, 1947.

This is a companion case to No. 56, *United States v. Powell,* and No. 57, *United States v. Atlantic Coast Line R. Co.,* decided this day [330 U. S. 238, ante, 868, 67 S. Ct. 742]. This case, like those, involves the construction of the provision §321(a) of the Transportation Act of 1940 [September 18] 1940, 54 Stat. 898, 854, 954 c. 722, 49 U. S. C. A. §65 (a), 10A F. C. A. title 49, §65 (a) which entitles "military or naval property of the United States moving for military or naval and not for civil use" to land-grant rates. 43 Stat. 477, 486, 10 U. S. C. §1375. It qualified to receive the higher rates authorized by §321 (a) of the Transportation Act of 1940 by the timely filing of the required release of land-grant claims pursuant to §321 (b) of the Act.[1]

The shipments in controversy were made over petitioner's railroad on government bills of lading in 1941, 1942, and 1943. They were admittedly government property at the time of carriage. Petitioner submitted its bills to the Government at the published commercial tariff rates. The United States, claiming that under §321 (a) of the Transportation Act each shipment was entitled to move at land-grant rates, deducted the difference between the commercial rates and the land-grant rates. Petitioner thereupon brought this suit under the Tucker Act to

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[1]This release was followed by a settlement of the litigation before this Court in *United States v. Northern P. R. Co.,* 311 U. S. 317, 85 L. Ed. 210, 61 S. Ct. 264. See *United States v. Northern P. R. Co.* (D. C. Wash.), 41 F. Supp. 273; S. Doc. No. 48, 77th Cong., 1st Sess.

recover the deducted sums. The District Court entered judgment for the United States on the claims here involved. 64 F. Supp. 1. The Circuit Court of Appeals affirmed. 156 F. 2d 346. The case is here on certiorari.

The shipments involved five types of property:

Copper cable.—Copper cable was transported to Tacoma, Washington, for use in the installation of degaussing equipment (a defense against magnetic mines) on a cargo vessel being so built that it might readily be converted into a military or naval auxiliary. The work was done by a contractor under contract with the Maritime Commission. The degaussing specifications were furnished by the Navy which also furnished the equipment and bore the cost. The vessel was delivered in 1941 and was operated as directed by the Maritime Commission or the War Shipping Administration. Whether it operated as a cargo vessel or as a military or naval auxiliary does not appear.

Lumber for construction of munitions plant.—In 1942 the Twin Cities Ordnance Plant was being constructed in Minnesota by contractors under the supervision of the Army. The plant was government owned and Army sponsored. Army officers were procuring agents for the lumber used in the construction. Petitioner transported lumber for use in the construction. The plant was completed in 1943 and manufactured ammunition for the armed forces.

Lumber for construction of Marine Corps pontons.—Petitioner in 1943 carried fir lumber to a plant in Minnesota to be treated, kiln dried, milled, and manufactured by a contractor into parts of demountable floating bridges required to move military personnel and war vehicles

across water barriers. The construction was under a contract with the Marine Corps. The manufactured product was either shipped overseas in connection with military or naval operations or was used in connection with the training of combat engineers.

Bowling alleys for Dutch Harbor.—Petitioner moved bowling alley equipment to Seattle, Washington, for reshipment to the Naval Air Base, Dutch Harbor, Alaska. The Navy had entered into a contract for the construction of an air base at Dutch Harbor on public land reserved for Navy use. The purchase and installation of the bowling alleys were pursuant to that contract and were approved by the Navy officer who had supervision and control of the construction program. The recreational facilities, which included the bowling alleys, were planned for initial use by the civilian construction crew and then, when construction work was ended, by the Navy. But in fact they were used only be members of the armed forces.

Liquid paving asphalt for Cold Bay, Alaska, airport.—In 1942 petitioner moved liquid paving asphalt to Seattle, Washington, for reshipment to Alaska. The asphalt was for use in constructing runways at an airport at Cold Bay under a program of the Civil Aeronautics Authority approved by a joint cabinet board as being necessary for the national defense. Work was commenced by a civilian contractor and, after the shipment had moved, was taken over by the Army which thereafter had full control of the field.

In four of the above instances the property was consigned to an army or navy officer; in the fifth, the shipment of liquid paving asphalt, the Civil Aeronautics Authority was the consignee. And as we have said, the

property in each case was at the time of shipment property of the United States. The question remains whether within the meaning of §321 (a) it was "military or naval" property and, if so, whether it was "moving for military or naval" use.

There is a suggestion that since the shipment of asphalt was to a civilian agency, the Civil Aeronautics Authority, it was not "military or naval" property. The theory is that "military or naval" property means only property shipped by or under control of the army or navy.

We see no merit in that suggestion. Section 321 (a) makes no reference to specific agencies or departments of government. The fact that the War or Navy Department does the procurement might, of course, carry special weight or be decisive in close cases. But it is well known that procurement of military supplies or war material is often handled by agencies other than the War and Navy Departments. Procurement of cargo and transport vessels by the Maritime Commission is an outstanding example. See Merchant Marine Act of 1936, §902, 49 Stat. 2015-2016, as amended, 46 U. S. C. §1242. And shortly before the Transportation Act of 1940 was enacted, Congress by the Act of June 25, 1940, 54 Stat. 572, 573-574, authorized the Reconstruction Finance Corporation to create subsidiary corporations to purchase and produce equipment, supplies, and machinery for the manufacture of arms, ammunition, and implements of war. And later that Act was amended to enable those corporations to purchase or produce any supply or article necessary for the national defense or war effort. Act of June 10, 1941, 55 Stat. 248, 249. As we have held in *United States v. Powell, supra,* not every purchase which

furthers the national defense is for "military or naval" use within the meaning of §321 (a). But property may fall within that category though it is procured by departments other than War or Navy.

It is also suggested that the property covered by the exception in §321 (a) is confined to property for ultimate use directly by the armed forces. Under that view materials shipped for the construction of vessels for the Maritime Commission and used to service troops at home or abroad would not be "military or naval" property. We likewise reject that argument. Civilian agencies may service the armed forces or act as adjuncts to them. The Maritime Commission is a good example. An army and navy on foreign shores or in foreign waters cannot live and fight without a supply fleet in their support. The agency, whether civil or military, which performs that function is serving the armed forces. The property which it employs in that service is military or naval property, serving a military or naval function.

But petitioner contends that, even if that is true, the construction of vessels or other military equipment or supplies is in a different category. It argues that none of the articles shipped in the present case was military or naval, since they were not furnished to the armed forces for their use. They were supplied, so the argument runs, for manufacture and construction which are civilian pursuits and which were here in fact performed by civilian contractors. Only the completed product, not the component elements, was, in that view, for military or naval use.

Military or naval property may move for civil use, as where army or navy surplus supplies are shipped for sale to the public. But in general the use to which the

property is to be put is the controlling test of its military or naval character. Pencils as well as rifles may be military property. Indeed, the nature of modern war, its multifarious aspects, the requirements of the men and women who constitute the armed forces and their adjuncts, give military or naval property such a broad sweep as to include almost any type of property. More than articles actually used by military or naval personnel in combat are included. Military or naval use includes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, all property which serves their many needs or wants in training or preparation for war, in combat, in maintaining them at home or abroad, in their occupation after victory is won. It is the relation of the shipment to the military or naval effort that is controlling under §321 (a). The property in question may have to be reconditioned, repaired, processed or treated in some other way before it serves their needs. But that does not detract from its status as military or naval property. *Southern Pacific Co. v. Defense Supplies Corp.*, 64 Fed. Supp. 605. Within the meaning of §321 (a) an intermediate manufacturing phase cannot be said to have an essential "civil" aspect, when the products or articles involved are destined to serve military or naval needs. It is the dominant purpose for which the manufacturing or processing activity is carried on that is controlling.

Measured by that test, there can be no doubt that the five types of property involved in the present litigation were "military or naval" property of the United States "moving for military or naval and not for civil use" within the meaning of §321 (a). The lumber for the pontons, the asphalt for the airfield, the lumber for the

ammunition plant were used in Army or Navy projects directly related to combat preparations or to actual combat. Copper cable for the cargo vessel, though farther removed from that category, was well within the definition of "military or naval" property. It, too, was a defensive weapon. Beyond that it was purchased by the Navy Department and consigned to one of its officers. It was supplied pursuant to Navy specifications; and the ship on which it was installed was being prepared for possible ultimate use by the Navy. The bowling alleys were also well within the statutory classification. The needs of the armed forces plainly include recreational facilities. The morale and physical condition of combat forces are as important to the successful prosecution of a war as their equipment. The fact that the bowling alleys were planned for initial use of civilianworkers makes no difference. It is the nature of the work being done, not the status of the person handling the materials, that is decisive. Supplies to maintain civilians repairing army or navy planes is a case in point. The dominant purpose of the project in this case was the same whether civilians or military or navy personnel did the actual work.

Petitioner contends that if Congress intended to include in "military or naval property" articles for use in the manufacture of implements of war, it would have said so. It seeks support for that position from other Congressional enactments under which such materials were excluded because not mentioned[2] or were included by spe-

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[2]The embargo against "arms or munitions of war" authorized by the Joint Resolution of March 14, 1912 (see 37 Stat. 1733), was held not to include machinery for the construction of a munitions plant. 32 Op. Atty. Gen. 132.

cific reference.[3] We can find, however, little support for petitioner's contention in that argument. Apart from the different wording of those acts and the different ends they served, there is one decisive and controlling circumstance. We have more in §321 (a) than a declaration that "military or naval" property is entitled to land-grant rates. Congress went further and drew the line between property moving for "military or naval" use and property moving for "civil" use. As we have said, the controlling test is the use to which the property is dedicated or devoted. The fact that Congress did not define what was a "military or naval" use as distinguished from a "civil" use is unimportant. The classification made by Congress under this Act, unlike that made under the acts on which petitioner relies, was all inclusive not partial. What is military or naval is contrasted to what is civil. The normal connotation of one serves to delimit or expand the other. It is in that context that "military or naval" must be construed.

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[3]Thus the Act of July 2, 1940, 54 Stat. 712, 714, Chap. 508, 50 U. S. C. A. App., §701, authorized the President to prohibit or curtail "the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operations thereof . . ."

The Act of November 30, 1940, 54 Stat. 1220, Chap. 926, 50 U. S. C. A., §101, 11 F. A. C., Title 50, §101, amending the Anti-Sabotage Act, defined "national-defense material" as including "arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, fuel, supplies, munitions, and all other articles of whatever description and any part or ingredient thereof," which the United States intended to use in the national defense.

The Act of October 16, 1941, 55 Stat. 742, c. 445, 50 U. S. C. A. Appx. §721, 11 F. A. C., Title 50, Appx. 20, §1, authorized the President to requisition the following types of property for the defense of the United States: "military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions . . ."

Petitioner also cotends that §321 (a) is a remedial enactment which should be liberally construed so as to permit no exception which is not required. Cf. *Piedmont & N. Ry. Co. v. Interstate Commerce Commission,* 286 U. S. 299, 311-312. But it is a familiar rule that where there is any doubt as to the meaning of a statute which "operates as a grant of public property to an individual, or the relinquishment of a public interest," the doubt should be resolved in favor of the Government and against the private claimant. *Slidell v. Grandjean,* 111 U. S. 412, 437. See *Southern Ry. Co. v. United States,* 322 U. S. 72, 76. That rule has been applied in construing the reduced rate conditions of the land-grant legislation. *Southern Pacific Co. v. United States,* 307 U. S. 393, 401; *Southern Ry. Co. v. United States, supra.* That principle is applicable here where the Congress, by writing into §321 (a) an exception, retained for the United States an economic privilege of great value. The fact that the railroads, including petitioner, filed releases of their land-grant claims in order to obtain the benefits of §321 (a) is now relied upon as constituting full consideration for the rate concession. It is accordingly argued that the railroads made a contract with the United States which should be generously construed. Cf. *Russell v. Sebastian,* 233 U. S. 195, 205. The original land-grants resulted in a contract. *Burke v. Southern Pacific R. Co.,* 234 U. S. 669, 680. Yet, as we have seen, they were nonetheless public grants strictly construed against the grantee. The present Act, though passed in the interests of the railroads, was in essence merely a continuation of land-grant rates in a narrower category. Therefore, it, too, must be construed like any other public grant.

Affirmed.

4. Transportation—Land-Grant Deductions—Military or Naval Property of the United States. (B-19374) 21 Comp. Gen. Op. 137.

"Comptroller General Warren to the Chairman, U. S. Maritime Commission, August 15, 1941:

"I have your letter of August 2, 1941, as follows:

"As you know the Commission is presently engaged in an extensive ship construction program for the construction of 312 emergency type cargo vessels under Public Law 5, 77th Congress, 1st Session, approved February 6, 1941, and the Lend Lease Act. Expansion of this program is probable.

"The emergency type vessels are being constructed pursuant to Public Law 5, whereby the Commission is authorized to provide 'as rapidly as possible cargo ships essential to the commerce and defense of the United States,' and pursuant to the Lend Lease Act and appropriations thereunder (Public Law 11 and Public Law 23, 77th Congress, 1st Session, approved March 11 and March 27, 1941, respectively) whereby the Commission is authorized to manufacture and procure cargo vessels defined as 'defense articles for the Government of any country whose defense the President deems vital to the defense of the United States.' In order to carry out this program with the speed expressed or inherent in the respective statutory authorizations, the vessels in question are of identical design and are under construction in emergency shipyards owned by the Government in various parts of the United States. Further in the interests of speed, efficiency, and economy the Commission has deemed it desirable to procure and provide, by contracting directly or through an agent, for the manufacture of the greater part of the mate-

rials and equipment for use in the construction of the emergency type vessels. Under this procedure as materials and equipment are needed by the various shipyards they are shipped to such yards under Government Bills of Lading. At the time of shipment such materials and equipment are property of the United States. The quantity of materials purchased directly by the shipbuilders or on an f.o.b. destination basis is relatively small.

"Obviously, large expenditures must be made by the Commission in payment of transportation charges and the probable extent of such expenditures must be determined as accurately as possible in order to provide for proper allocation of funds in the Commission's budget. Under present circumstances, however, it is extremely difficult to ascertain the extent of the funds necessary to allocate from time to time on account of such charges. Due to the withdrawal of ships from intercoastal trade and due to the fact that the urgent needs of the shipyards frequently require rail shipment even if water carriage were otherwise available, a reasonable anticipation of transportation charges is particularly difficult with respect to iron and steel, and their products, in view of the extreme differential prevailing between rail and water rates on such items. In this connection, the Commission, through its Director, Emergency Ship Construction Division, has been requested by the Office of Price Administration and Civilian Supply to authorize that agency to represent the Commission's views with regard to securing the agreement of the railroads to reduce their commercial rates on iron and steel, and their products, and also to consider negotiating a rate under Section 22 of the Interstate Commerce Act for shipments of Government

property not subject to land grant reduction. In view of the large quantity of freight moving under the emergency ship construction program, the Commission has indicated accord with the general aims mentioned above and is interested in an early determination of the problems involved. We have been advised by the Office of Price Administration and Civilians Supply, however, that while the Transportation Act of 1940 abolished land grant deductions with respect to Government property, the railroads have expressed unwillingness to reduce their commercial rates so long as there is any doubt as to the application to Maritime Commission property of the exception contained in Section 321, Part II, Title III, of the Transportation Act which leaves in effect land grant rates so far as concern the shipment of 'military or naval property of the United States.' The applicable portion of said section reads as follows:

" 'Sec. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1(7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; * * *'

"The doubt in this case appears to be predicated upon the unquestioned fact that the vessels for which the

materials and equipment purchased by the Commission are to be used, are being constructed as part of the Government's emergency National Defense Program.

"The work under the Commission's emergency cargo vessel program was commenced pursuant to authorization by the President with funds allocated or authorized under the emergency fund for the President contained in the Military Appropriation Act (Public No. 611, 76th Congress, approved June 13, 1940) which Act provides, in part, with respect to said fund, as follows:

" 'To enable the President, through the appropriate agencies of the Government, without reference to section 3709, Revised Statutes, to provide for emergencies affecting the national security and defense and for each and every purpose connected therewith, including all of the objects and purposes specified under any appropriation available or to be made available to the War Department for the fiscal years 1940 and 1941; and the furnishing of Government-owned facilities at privately owned plants; * * *'

"Funds allocated under said emergency fund were used in financing the construction of shipbuilding facilities essential to the construction of the vessels.

"Public Law 5, under which 200 of the 312 emergency cargo vessels are being constructed, appropriates sums which by the terms of the Act are, in addition to the foregoing, necessary under a program of $350,000,000 to provide for the facilities and the construction of the ships. In this connection the President, in a message to Congress on January 16, 1941, said:

" 'Because of the urgency of the situation, and after consultation with the Office of Production Management

with respect both to the necessity for immediate action and to the coordination of this ship construction with other phases of the national-defense program, I have already allocated to the Maritime Commission the sum of $500,000 from the emergency fund for the President contained in the Military Appropriation Act, 1941, and have authorized the Commission to enter into contracts for these purposes to the extent of $36,000,000 under the contractual authority contained in said appropriation.'

"Irrespective of the possible subsequent disposition of these vessels the materials and equipment destined for use in their construction are at no time in the custody or control of the military or naval establishments of the Government. Accordingly, it seems a determination that such materials and equipment are 'military or naval property' must be based upon the broader ground that but for the existence of emergencies affecting the security and defense of the United States the program would not have been launched.

"In general, the classification of the component materials and equipment for the 112 emergency type vessels being constructed under the Lend Lease Act, as 'military or naval property of the United States,' is governed by the same considerations prevailing with respect to the 200 vessels being constructed pursuant to Public Law 5.

"In view of the use of the words 'military or naval' in connection with the transportation of members of the military or naval forces of the United States in said Section 321 of the Transportation Act, 1940, the Commission inclines to the view that by parity of reasoning, 'military or naval property' should be confined to property in actual use or custody of the War or Navy Depart-

ments. However, since the vessels in question are being constructed solely because of the emergencies affecting the security and defense of the United States, and since the applicable legislation was designed to further the ends of national defense from the point of view of military and naval preparedness, the Commission believes that there exists sufficient doubt in the premises to ask for a determination of the question by your office.

"In view of the resultant appropriation saving in the event land grant rates are applicable to this freight, and the possibility of a favorable conclusion to the aforementioned negotiations pending between the Office of Price Administration and Civilian Supply and the rail carriers in the event land grant rates are not applicable, it is respectfully requested that we may receive your decision at an early date.

"It is understood from the foregoing that the question presented relates to the right of the United States to deduction for land grant from commercial transportation charges on shipments of iron and steel procured by the United States Maritime Commission for the construction of certain cargo vessels, 200 of which are to be constructed under authority of the joint resolution approved February 6, 1941, Public Law 5, 55 Stat. 5, making an appropriation to the Martime Commission for emergency cargo ship construction, and the remainder, 112 cargo vessels, under authorizations made pursuant to the Act to Promote the Defense of the United States, approved March 11, 1941, being Public Law 11, 55 Stat. 31.

"It is noted you state that the materials and equipment destined for use in the construction of these vessels are at no time in the custody or control of the military or

naval establishments of the Government and that the Maritime Commission is inclined to the view that the term 'military or naval property' as used in the Transportation Act of 1940, 54 Stat. 898, should be confined to property in the actual use or custody of the War or Navy Departments, but that doubt in the matter exists by reason of the unquestioned fact that the vessels concerned are being constructed solely because of emergencies affecting the security and defense of the United States and pursuant to legislation designed to further the ends of national defense from the point of view of military and naval preparedness.

"In connection with the considerations so advanced it will be observed that the provisions of the Transportation Act of 1940, prescribing exemption from the requirement for the payment otherwise of the full applicable commercial rates and charges for or on behalf of the United States, relate in terms to 'military or naval property *of the United States* moving for military or naval and not for civil use' (italics supplied). There is no specific limitation of such exemption to property in the custody or control of the War or Navy Departments; and if military or naval property belonging to the United States is transported for military or naval and not for civil use, it is not apparent why deductions for land-grant, if otherwise available, are not required to be made. That military purposes may be served by construction under the direction or control of departments other than the War and Navy Departments seems sufficiently manifest from the provisions of the Emergency Relief Appropriation Act, fiscal year 1941, 54 Stat. 611, making appropriation of $975,650,000 to the Work Projects Administration, and con-

taining a provision for the use, by the Commissioner of Work Projects, of not to exceed $25,000,000 of the sum so appropriated to supplement amounts authorized for other than labor costs in connection with projects certified by the Secretary of War and the Secretary of the Navy, respectively, as being important for military or naval purposes. See in this connection 20 Comp. Gen. 438. See, also, in this connection, Public Law 166, approved July 11, 1941, 55 Stat. 584, which amends section 1 of the Act of January 28, 1915, 38 Stat. 800, so as to provide that the Coast Guard, which operates usually under the Treasury Department in time of peace, 'shall be a military service and constitute a branch of the land and naval forces of the United States at all times.'

"Concerning the construction of the 200 vessels under the joint resolution of February 6, 1941, *supra,* it is noted that said act appropriated funds 'for the purpose of providing as rapidly as possible cargo ships essential to the commerce and defense of the United States,' said funds to be available for the construction of 'ocean-going cargo vessels' of such type as the Maritime Commission may determine to be useful in time of emergency 'for carrying on the commerce of the United States.' In the report of the Committee on Appropriations, House of Representatives, relative to this resolution (Report No. 10), it is stated at page 2:

"The necessity for the emergency construction of these cargo ships arises from the depletion of the reserve tonnage of American registry due to a number of causes and the facing of a problem of having sufficient cargo ships for the needs of American commerce. The committee was advised that every ship left in the reserve fleet

is up for sale or charter or will be disposed of soon. The demand for ships exceeds the supply.

"Similarly, the report of the Senate Committee on Appropriations (Senate Report No. 7) in connection with this resolution states:

"The immediate need for the emergency construction provided for in this joint resolution is due to a possible world shortage of cargo vessels, the depletion of our reserve fleet and the additional demands for American ships for use in the avenues of commerce that are still open to them, which demands exceed the supply.'

"As further indicating the expectation that these ships would be devoted primarily to purposes of commerce rather than of war, there have been noted the views expressed in the following excerpts from the hearings before the subcommittee of the Committee on Appropriations, House of Representatives, in connection with this legislation:

"Page 4:

"Admiral Land. This particular appropriation covers 200 ships.

"Mr. Johnson of West Virginia. What are you going to do with them?

"Admiral Land. We are going to operate them.

"Mr. Ludlow. Would they be held in reserve for any particular purpose, Admiral?

"Admiral Land. I would say they would be held in reserve for the transportation of American commerce. Where they would be operated it would be useless for me to attempt to predict, because these ships will not be available for some time. The first ship, we estimate, will be completed in 11 months after the date of the contract,

and the total program will be completed in 24 months after the date of the contract.

"Page 5:

"Mr. Cannon. What comparison is there in need and circumstances and purpose, as between these ships and the wooden ships built during the World War?

"Admiral Land. I do not think there is any proper basis of comparison between these and the wooden ships, because these are so far superior to the wooden ships, in carrying capacity and other ways.

"Mr. Cannon. Are they being asked for the same purpose?

"Mr. Land. I would say, generically they are, with this modification. The wooden ships and the concrete ships in the last war were built for what is generically known as the bridge of ships between here and Europe. There is no such purpose in this, as far as my knowledge does. There were some 2,300 vessels built for this bridge of ships, and here we are talking about 200 ships. There is no comparison.

"Mr. Cannon. They are not being requisitioned for the same purpose?

"Admiral Land. No; as far as my knowledge goes they are for American commence.'

"Page 11:

"Mr. Ludlow. Will they be used exclusively for American commerce, or will they be used in cooperation with Great Britain?

"Admiral Land. They would be more for the transportation of American commerce. As I have indicated,

there is a probable use for them in the intercoastal and domestic trade, in which they would be superior to what we have now. As to what may happen to them after that, I would not want to prophesy.

"With respect to the Act to Promote the Defense of the United States, approved March 11, 1941, 55 Stat. 31, and the Defense Aid Supplemental Appropriation Act, 1941, approved March 27, 1941, 55 Stat. 53, under which it is understood the remaining 112 vessels are being constructed, it is noted that under the former the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government, may be authorized by the President to Manufacture or procure, to the extent funds are made available therefor, and to sell, transfer title to, lease, lend, or otherwise dispose of any defense article to the government of any country whose defense the President deems vital to the defense of the United States. The term 'defense article' is defined in said act as meaning, among other things, 'Any weapon, munition, aircraft, vessel, or boat' and 'Any agricultural, industrial, or other commodity or article for defense.'

"In the report of the Committee on Foreign Affairs, House of Representatives, concerning this measure (Report No. 18), it is stated:

"It should be noted that the term 'defense article' includes not only all arms, munitions, and implements of war, but also other articles or commodities such as cotton, wheat, and all other agricultural products which may be necessary for defense purposes. * * *

"Likewise in the report of the Senate Committee on Foreign Relations relative to the matter (Senate Report

No. 45), the scope of the term 'defense article' is the subject of comment as follows:

"The term 'defense article' is defined so as to include the usual implements of war, such as guns, airplanes, and tanks, and also the food, clothing, medical supplies, and the like, without which warring nations could be helpless. * * *

"In connection with the Defense Aid Supplemental Appropriation Act, 1941 (Public Law 23), making an appropriation of $7,000,000,000 to enable the President to carry out the provisions of the above act, the report of the Committee on Appropriations, House of Representatives (Report No. 276), in explanation of the omission of minute details concerning the matters covered by the appropriation, states:

"* * * The procurements under the funds in this bill are for weapons and instruments of war to aid the countries which are engaged in a desperate struggle and whose success in that combat is vital to us. * * *

"However, the act provides in section 3 that—

"Any defense article procured from an appropriation made by this Act shall be retained by or transferred to and for the use of such department or agency of the United States as the President may determine, in lieu of being disposed of to a foreign government, whenever in the judgment of the President the defense of the United States will be best served thereby.

and it is assumed that if the 112 vessels to be constructed under these acts are not to be devoted to use by a foreign government, but instead are to be retained for use by the United States along with the 200 cargo ships to be con-

structed under the joint resolution of February 6, 1941, such action would be pursuant to this provision.

"Therefore, viewing your question in the light of the purposes to be served, so far as is discernible from the legislation under which it appears the vessels are to be constructed, it would seem reasonably clear that while the construction of the vessels for which provision is made in the joint resolution of February 6, 1941, may have resulted from, or may have been necessitated by, the demands arising under the national defense program, the primary purpose of said joint resolution was to provide said ships as a means of preserving or furthering the interests of the commerce of the United States and to augment the depleted facilities available for that purpose, replacing vessels withdrawn from said service because of the demands of defense. On the other hand, in the Act to Promote the Defense of the United States and in the Defense Aid Supplemental Appropriation Act, 1941, the emphasis seems to be placed principally upon the rendering of direct aid in resistance to military aggression, though it is conceivable, at least, that in some instances articles authorized to be manufactured or procured under said acts might be put, as a matter of defense, to a use not directly connected with military operations. Within the scope of these objectives, it is realized that there is possible a wide variation in the purpose to be served through the use of cargo vessels, ranging from the carrying of munitions and supplies for direct consumption by military forces in the theatre of war, on the one hand, to the transportation of cargoes for domestic consumption, related, as a matter of defense, to military operations only remotely, if at all, on the other. The question as to whether the materials to

be procured for the construction of the cargo vessels here concerned under either act are to be directed to the accomplishment of the one or the other of these purposes is a question of fact concerning which information, initially at least, would seem to be an exclusive possession of the administrative agencies involved. The administrative determination, therefore, that the transportation involved in any particular instance embraces materials moving for military or naval and not for civil use will be given appropriate consideration. Having regard, however, to the purpose or use apparently intended to be served by the legislation concerned, it is believed that with respect to the materials for the construction of the cargo vessels authorized under the joint resolution of February 6, 1941, this office would not be required to object to the payment of transportation charges without deduction for land-grant in the absence of an administrative determination that, under the particular facts that may be involved in any instance, said materials are being transported for military or naval and not for civil use. Likewise, with respect to the materials for the construction of cargo vessels pursuant to the authorizations in the Act to Promote the Defense of the United States and the Defense Aid Supplemental Appropriation Act, 1941, if it be administratively determined that said vessels are to serve the purposes of commerce—as a matter of defense—rather than to participate in the carrying of supplies for military purposes, and that, therefore, the transportation of materials for their construction is regarded as involving materials moving for civil rather than military or naval use, the administrative certification accordingly will be accepted by this office as *prima facie* correct.

"Your question is answered accordingly."

No. [redacted]

In the United States Circuit Court of Appeals for the Ninth Circuit

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UNITED STATES OF AMERICA, APPELLANT

v.

[redacted] ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLEE

[redacted] ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES OF AMERICA AS APPELLANT

H. G. MORRISON,
Assistant Attorney General,
JAMES M. CARTER,
United States Attorney,
Attorneys for the United States.

Of Counsel
EDWARD H. HICKEY,
Special Assistant to the Attorney General
[redacted] STEAD B. ROOD,
Attorney, Department of Justice

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AUTHORITIES CITED

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11480

UNITED STATES OF AMERICA, APPELLANT

v.

PACIFIC ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLEE

PACIFIC ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES OF AMERICA AS APPELLANT

JURISDICTIONAL STATEMENT

Suit was filed in the United States District Court for the Southern District of California, by Pacific Electric Railway Company against the United States pursuant to the provisions of the Tucker Act, Act of March 3, 1887, 28 U. S. C. Sec. 41 (20) and 761–765, for additional freight charges (R. 2).

Following answer and trial upon stipulations of fact, the District Court entered a final judgment (R.

49), from which both parties have appealed (R. 51–2). The District Court's opinion is reported at 71 F. Supp. 987. This Court has jurisdiction to review the judgment of the District Court under Section 128 of the Judicial Code, 28 U. S. C. Sec. 225.

QUESTION PRESENTED

Whether the goods in the four shipments from the plants of the Inland, Carnegie-Illinois, Otis, and Youngstown steel companies were "property of the United States" within the meaning of the proviso reserving land-grant freight rates to the government in Section 321 (a) of the Transportation Act of 1940.

STATUTE INVOLVED

The relevant portions of the Transportation Act of September 18, 1940, 54 Stat. 898, 954, are as follows:

> SECTION 321 (a). Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use. * * *
>
> ---
>
> SEC. 322. Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any

common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

STATEMENT OF THE CASE

This is an appeal from that part of the order and nal judgment of the District Court awarding plaintiff ie sum of $1,143.66, being the difference between ommercial rates charged for shipments of property nd land-grant rates paid by the Government (R. 49). Plaintiff, as last in a series of connecting railroad arriers, brought this action (R. 2–12) for freight harges allegedly due from the government at full ommercial tariff rates on a number of shipments of oods, which consisted of the component parts of iberty Ships being constructed at Los Angeles Harbor under the United States Maritime Commission's ssential War Emergency Ship Construction program R. 14–21). The government contended that the isputed shipments were "military or naval property f the United States moving for military or naval nd not for civil use * * *" within the proviso f Section 321 (a) of the Transportation Act of 1940; *supra;* and deducted the difference between land-grant nd commercial rates (R. 23–39). Plaintiff's claims ere presented in eight carriers' freight bills, involving shipments of materials under twenty-one Gov-

ernment bills of lading, procured in accordance with eleven contracts entered into by the Maritime Commission with steel companies located in various parts of the United States.[1] All of the goods were moved on government bills of lading to the Maritime Commission at Los Angeles Harbor (California Shipbuilding Corporation in some cases receiving them as agent) (R. 21, 41).

Upon facts largely stipulated, the court below held that all twenty-one shipments were "military or naval property moving for military or naval and not for civil use," that seventeen of them were property of the United States at the time of shipment, and that those seventeen shipments were therefore entitled to land-grant rates in accordance with Section 321 (a). The court held that the remaining four shipments were not entitled to land-grant rates solely on the ground that these were not property of the United States at the time of shipment (R. 49, 50), that is to say, when being transported by rail.

From the ruling on these four shipments the Government has taken this appeal, asserting that the goods transported were property of the United States within the meaning of Section 321 (a).

The contracts pursuant to which the four disputed shipments were made comprise the following:

1. *The Inland Steel Contract* (R. 26–8, 65).[1] The

[1] The documents pertaining to the specific contracts and shipments may be identified from Table I, as set forth in the Appendix.

purchase order from the Maritime Commission [2] to Inland Steel Company, Indiana Harbor, Indiana, dated August 12, 1941, for steel plates (the subject of the shipment) included the following provisions (R. 26–8):

> (a) Inland was requested to furnish engine room and boiler plates "in accordance with attached * * * Inland Steel Co. proposal of June 27, 1941."
>
> (b) Prices were "Delivered Base Prices per 100# FOB Cars" Los Angeles, California.
>
> (c) "Title to all of the products covered by this order will remain in the Seller until delivery thereof has been made to the Buyer at the destination herein named." (The destination therein named was Los Angeles.)
>
> (d) "The Seller's responsibility for delivery shall terminate on the arrival of the material at the destinations shown in this order."
>
> (e) "Cash discount to be allowed on discount base as stated on invoice, being the delivered price of the material less the transportation charges taken into account in arriving at such price."
>
> (f) "Such changes as may occur in the tariff freight rates or transportation charges used in determining the delivered prices provided for in this contract, except switching charges, after date of order, and on or prior to date of shipments will be for account of Buyer."
>
> (g) "Shipments to be on Government bills of lading."

---

[2] Each purchase order shows that it was negotiated for the Maritime Commission by Gibbs and Cox, Inc., a private firm of naval architects in New York. (This is the "G. & C." mentioned in the record. R. 30.)

(h) "The equipment ordered herein is required for the construction of emergency cargo vessels."

(i) "There are no written understandings or agreements between the Buyer and Seller relative to this order that are not fully referenced or expressed herein."

The Inland Steel Company's proposal referred to in paragraph (a) above, which was attached to the purchase order, stated, among other matters that:

> If the Government wishes to take possession of this material at our plant and ship on Government bills of lading in order to take advantage of land-grant freight rates, we will deduct the regular commercial freight rate, which at present is $1.10 per 100 lbs.

2. *The Carnegie Contract* (R. 29, 66).[1] The purchase order from the Maritime Commission to Carnegie-Illinois Steel Corporation, Munhall, Pennsylvania, for steel angles and steel channels (the subject of the shipment) dated June 20, 1941, was generally similar to the Inland contract. It set forth a schedule of "Delivered base prices per 100# F. O. B. cars, Los Angeles, California," and specified that "Title to all of the products covered by this order will remain in the seller until delivery thereof has been made to the buyer at the destination named herein," and "Shipment to be made on Government bill of lading." The destination named therein was Los Angeles (R. 29).

3. *The Otis Contract* (R. 32–33, 68).[1] The purchase order from the Maritime Commission to Otis

[1] See footnote, p. 4.

Steel Company, Cleveland, Ohio, for steel plates, the subject of the shipment, was generally similar to the above purchase orders (R. 32–33). Its provisions contained the following:

"Price—*Delivered Base Price*

per 100 lbs. f. o. b. Cleveland, Ohio, plus freight all rail in carload lots * * *"

There followed a list of actual delivered prices as thus calculated for several shipbuilding points. One of these was, "Terminal Island, Los Angeles, California Unit Price $3.37."

"Any increase or decrease in freight rate will result in a corresponding increase or decrease in delivered price."

"Price quoted herein is based on freight rates in effect at date of this quotation. If any increase in freight rates shall become effective prior to acceptance of the quotation by the Buyer, the price shown herein shall be revised accordingly."

Seller's responsibility would terminate on arrival at the "fabricating point."

"The goods covered herein are the property of the Seller until delivered to the Buyer at the Buyer's fabricating point herein specified and shall not be diverted or reconsigned without permission of the Seller." The fabricating point was Los Angeles.

4. *The Youngstown Contract* (R. 33, 69).[1] The purchase order from the Maritime Commission to the Youngstown Sheet and Tube Company, Youngstown Ohio, for steel sheets, the subject of the shipment, dated November 27, 1941, provided that the price was to be "$2.60 per 100# net f. o. b. your mill, Youngs-

[1] See footnote, p. 4.

town, Ohio" (R. 33). It contained clauses as to the seller's responsibility and interest in the goods shipped thereunder, which were the same as those in the Otis contract.

The goods purchased under each of these four contracts were shipped on standard government bills of lading issued by the Maritime Commission. (Copies appear at pages 65–70 of the Record.) Among other provisions, each bill of lading recites that the carrier has received "the public property hereinafter described." The bill of lading contains, under the heading "Certificate of Issuing Officer," the designation of "F. O. B. point named in contract" and, in each case, the f. o. b. point thus designated was the location of the seller's plant, and not Los Angeles. The shipments all took place between December 9 and December 31, 1941. Their details were actually arranged by the respective sellers, using the bills of lading furnished by the Maritime Commission, and acting as agents for the Commission.

It should be noted that these four shipments were quite similar in the general patterns of the purchase contracts and bills of lading to the other seventeen shipments under government bills of lading that were resolved in favor of the government by the court below. All twenty-one shipments were integral parts of the procurement and construction of certain Liberty ships at Los Angeles, which in turn were integral parts of the entire wartime Liberty ship construction program.

The court below differentiated the four shipments from the others and held that they were not "prop-

erty of the United States" only because a provision in each of the four purchase orders purported to reserve title in the seller until arrival of the goods at "destination." It is the contention of the government that, notwithstanding such provision, the intent of the parties to these contracts was clearly to transfer title to the government at the shipping point and, alternatively, that even if title was retained by the seller, the government nevertheless had such a property interest in the goods as entitled it to the benefit of the land-grant rate reserved in the proviso of Section 321 (a) for military or naval property of the United States.

SPECIFICATION OF ERRORS

1. The District Court erred in holding that the shipments covered by government bills of lading Nos. MC–88579, MC–22992, MC–28270, and MC–34759 were not the "property of the United States" at the time of shipment, according to the meaning of that term in Section 321 (a) of the Transportation Act of 1940.

2. The District Court erred in not holding that the shipments covered by said government bills of lading were property of the United States at the time of shipment and while in transit.

3. The District Court erred in holding that the shipments covered by said bills of lading were entitled to be moved by the carriers at full commercial freight rates, and in not holding that they should have been moved at land-grant rates.

4. The District Court erred in not applying the usual rules of construction in construing the docu-

ments and acts evidencing the contractual relations between the Maritime Commission as buyer and the Inland, Carnegie, Otis, and Youngstown steel companies, respectively, as sellers.

5. The District Court erred in awarding judgment for plaintiff.

SUMMARY OF ARGUMENT

I

Upon realistic appraisal the entire transaction and course of conduct of the parties to the Inland, Carnegie, Otis, and Youngstown contracts, respectively, shows that the parties intended title to pass to the government at the time when the goods were shipped, and at the shipping points. Alternative constructions are offered, either one of which supports this contention.

A. The provisions in the proposals and purchase orders themselves, which comprise the original contracts, show a clear intent for title so to pass. The formal clauses reserving title in the seller are outweighed by other clauses specially included to express the intent for title to pass at shipping point, so as to enable the government to obtain land-grant freight rates required by the statute.

B. After the formation of the original contracts, but before the goods had been shipped, the parties demonstrated their agreement for title to pass at shipping point when the Maritime Commission issued government bills of lading for the particular goods, naming the shipping points as the f. o. b. points ac-

cording to the contracts, and when the sellers accepted and used the bills of lading as thus filled out.

In any event, the sellers did in fact transfer title to the government as buyer when, as agents for the buyer, they delivered the goods for shipment and transportation to Los Angeles according to the terms of the government bills of lading described above, which identified the goods as "public property." Through this delivery to the carriers for the account of the buyer title passed, and the executory contracts to sell *in futuro* were converted into executed sales.

In construing the situations otherwise the District Court ignored the established canons for interpreting the documents in light of the conduct of the parties, trade usages, and other relevant circumstances.

II

Even assuming that title to each shipment remained in the seller, nevertheless the goods shipped were property of the United States within the meaning of Section 321 (a) of the Transportation Act of 1940, (*supra,* p. 2). The right to land-grant rates reserved in the *proviso* of that section does not turn upon title, but upon whether the goods are "military or naval property of the United States * * *." Certainly the beneficial ownership and property interest were in the United States. It is a familiar rule of statutory construction that if any ambiguity exists in Section 321 (a) (which was a legislative grant) it should be resolved in favor of the government rather than the railroad companies. Thus, after

the carriers had received the goods from the sellers acting as agents for the buyer, the control over the goods was entirely in the government. The carriers, through the government bills of lading, acknowledged that the goods were public property, for whom the carriers were performing transportation services, subject to diversion or reconsignment at the government's direction exclusively. The carrier's liability as insurer ran to the government, which bore the risk of loss as against the seller.

Even in peacetime the property in the goods would have been in the government. The wartime requirements of priorities and allocations reinforce the conclusion that there was no vestige of control left in the sellers in respect to the goods. The inclusion of the title reservation provisions in the original contracts were at the most merely the execution of a trade custom in commercial sales to preserve a security title and keep the sale conditional rather than absolute until payment had been made. Such a consideration was quite irrelevant in a sale to the government, whose credit could not have been in doubt.

Whether or not there was a bare title left in the sellers the goods were government property unquestionably within the meaning of the statute.

ARGUMENT

I

The United States took title to the goods at the shipping points

It is the government's view that, correctly interpreted, the course of each contractual relationship between the seller and the government clearly indicates

the intent of the parties to transfer title to the goods sold at the shipping point. It is submitted that a realistic appraisal of the transaction as a whole indicates that such was the intention of the parties as originally expressed in the purchase contracts, notwithstanding the inconsistent provision in four of them reserving title in the seller. In any case, even if the title provision is deemed originally controlling, the parties modified their agreement and provided for title to pass at the shipping point, which was actually accomplished when the sales were completed through subsequent appropriation of the goods to the contract and shipment for account of the buyer.

A. The parties so intended when they made the contracts

The time of transfer of title as between seller and buyer is to be determined by the intention of the parties, which, as the District Court states, "is to be gathered from their conduct, the terms of the contract, the usages of the trade and other circumstances surrounding the transactions. Uniform Sales Act, Sec. 17, 18" (R. 43). Consequently, in determining the intent of the parties as to the moment for title to pass, it is necessary to consider the proposals and purchase orders comprising the original contracts, the bills of lading and how they were handled, and the conduct of the parties and carriers with respect to the goods when they had come into being and were turned over for shipment to Los Angeles. The inquiry should extend to the question of when the seller actually turned over all control and interest in the goods to the buyer.

At the outset it should be noted that the steel companies were following established trade selling practices and were in the process of adapting themselves to wartime conditions, converting to war production for the government, which included the Maritime Commission as federal procurement agency for this part of the gigantic mobilization. The events herein took place either shortly before or just after Pearl Harbor, and the procurement was under new wartime conditions of control through steel priorities and allocations, as well as the old specific practice of using land-grant freight rates wherever possible, through government bills of lading.

"That as a general rule the delivery of goods by a consignor to a common carrier for account of a consignee has effect as delivery to such consignee is elementary." *United States* v. *Andrews,* 207 U. S. 229, 240. "The general rule is that title passes from seller to buyer with the delivery of the goods." *Louisville & Nashville R. R.* v. *United States,* 267 U. S. 395, 400. These maxims were quoted with approval in the District Court (R. 43–4). In every instance herein the seller did deliver the goods to a common carrrier for the account of the government as buyer (R. 43, 23–38). Therefore, the District Court construed the situation as conforming to this general rule with respect to the goods purchased and delivered under the Maritime Commission's contracts with the Foster-Wheeler, Combustion Engineering, Jones & Laughlin, Republic Steel, and Joshua Hendy companies (R. 42–6). Those contracts were in the same normal pattern and with the same type of provisions

as the Inland, Carnegie, Otis, and Youngstown contracts, except that the latter included the form provision reserving title until delivery at "destination." The District Court called this provision a "manifest inconsistency," but refused to hold that the contracts as a whole fell into the same normal pattern as to title. This refusal was only through *absolute deference to this single provision,* before which the general rules of intent and sales were discarded, or, as the District Court said, *"The usual indicia of intention become immaterial"* even if the provision was *"an oversight"* (R. 45). This was error. The usual indicia may not be so discarded.

Turning to the documents themselves (in the four disputed contracts), careful examination in light of "the usual indicia" must produce one of two conclusions. The first of these alternatives is that the parties intended to pass title to the government at the shipping point, and if the clause reserving title in the seller should be deemed to conflict with this intention, it was completely outweighed by the other provisions and agreements to be read with it. (The second alternative, that there was a modification or novation is discussed later.)

The mechanics of the transactions, substantially identical in each of the eleven contracts, are particularly spelled out in the record as to the contract with Inland Steel Company, one of the four on which the District Court refused to permit land-grant rates. Further, by way of contrast, the mechanics of the Jones & Laughlin contracts are also spelled out in the

record. On these the District Court did allow land-grant rates according to the usual pattern, and comparison of the two situations is instructive.

The two Jones & Laughlin purchase orders both set forth a price basis as follows:

> Base prices per 100 lb. delivered f. o. b. cars at the shipyard, Los Angeles, California, as follows, depending on the method of shipment:
>
> | | |
> |---|---|
> | All rail shipment | $3.37 |
> | All rail shipment on government bill of lading allowing commercial rate of freight at $1.27 per 100 lb. | 3.37 |
> | Via rail and water | 2.98 |

(R. 30).

Another clause, however, prescribed shipment on government bill of lading. In other words, the standard price basis was quoted with optional transportation via commercial rail billing, government rail billing, or rail-water. The government rail option was elected by the purchaser, as the order clearly shows, but the standard form price clause was left in anyway, providing for the f. o. b. point to be Los Angeles, the point of delivery or, insofar as the seller was concerned, the "destination." Taken alone, this clause would indicate that title was to pass at destination. This would have been consistent with the established policy of the steel industry to make sales on a delivered-price basis (the basing point price-plus-freight), the pricing system developed from "Pittsburgh plus."[3] However, it is quite inconsistent with

[3] See the following statement of the Carnegie-Illinois company's parent corporation:

"Steel is generally sold on a delivered price basis. A delivered price is the price of steel delivered at the town or city where the consumer of such steel is located. The use of delivered prices re-

the government bill of lading mechanism, under which delivery was to the buyer at shipping point, and the delivered-price maintenance was irrelevant. The parties went ahead and accomplished the sale and delivery at Pittsburgh, and in the Jones & Laughlin bill of lading they simply designated Pittsburgh instead of Los Angeles as the "F. O. B. point named in contract." By express provisions it was understood that the use of the government bill of lading shifted the delivery point to Pittsburgh. The *special* provisions about the bill of lading overruled the *form* price clause. In this connection, Gibbs and Cox wrote an enlightening letter to Jones & Laughlin before the purchase order was drawn up, stating that—

---

sults largely from the fact that the cost of transporting steel from the steel mill is often a substantial part of its cost at point of consumption. Buyers for this reason are seldom interested in its price at any place except where they need it. Manufacturers of steel must take this into account. * * *

"Under the so-called '*Pittsburgh plus*' practice, which the steel industry generally used until the 1920's, delivered prices were calculated on the basis of the quoted f. o. b. Pittsburgh price, with the addition of railroad freight from Pittsburgh to the buyer's destination, regardless of where the steel was produced. * * * The practice of using basing points other than Pittsburgh did not become generally prevalent until about 1924. * * * the present method of determining delivered prices in the steel industry * * * is often termed a '*multiple basing point system.*'"

The Basing Point Method of Quoting Delivered Prices in the Steel Industry, United States Steel Corporation, reprinted in Temporary National Economic Committee Hearings on Pub. Res. 113, 76th Cong., 3d Sess., part 27 (1940), Exhibit 1418, pp. 14619, 14620; also reprinted in T. N. E. C. Monograph 42 (1941), p. 31.

> The United States Maritime Commission has directed that your base price, amounting to $2.10 per 100 pounds, f. o. b. your mill be accepted, shipment to be on government bill of lading * * * (R. 30.)

It is submitted that the presence of the old delivered-basis clause in the formal order, although inconsistent, is overriden by the specific intent of the parties to do whatever had to be done to get the goods transported on government bills of lading.

At any rate, the buyer did take delivery of the goods at Pittsburgh (with title) as the bill of lading shows (R. 67); and the court below, applying the "usual indicia of intention" so found. The delivered price basis, f. o. b. Los Angeles, but with freight allowed, was treated by the parties, and by the court, as tantamount to basis f. o. b. shipping point.

From then on, even if the government had stopped the shipments in transit and diverted the materials to another shipyard, say, at San Francisco or even at Mobile, on the Gulf of Mexico, there would have been no difficulty. The goods were government property, sale had been accomplished at Pittsburgh, and an inconsistent form provision in the original purchase order providing for sale f. o. b. Los Angeles was, in view of the other provisions, a fortuitous dead letter.

Taking up now the Inland Steel contract for comparison, a reading of the provisions as a whole shows that the parties intended to execute precisely the same kind of transaction as in the Jones & Laughlin sales. The same form price basis was stated in the pur-

chase order, i. e., delivered f. o. b. Los Angeles (Supra, p. 5.) The Inland proposal, however, had stated that—

> . If the government wishes to take possession of this material at our plant and ship on government bill of lading in order to take advantage of land grant freight rates, we will deduct the regular commercial freight rate. * * *

We submit, upon the above analysis of the Jones & Laughlin contracts, that this, too, was tantamount to a basis f. o. b. shipping point. It is clear why this option was included, viz, to give the government land-grant rates, which required that the goods become government property at the shipping point, as signified by a government bill of lading.

The purchase order was in the same pattern as for Jones & Laughlin. The price basis was: delivered f. o. b. cars Los Angeles. This, however, was followed in the Inland contract by another form provision reserving title, not until the goods should reach Los Angeles specifically, but until they should arrive at "the destination named herein." Clearly this was but an adjunct of the delivered-price clause, with which it should stand or fall.

Again, the formal provision should yield to the substantive intent of the parties as signified by the special provisions providing for a government bill of lading expressly in order that the government could have land-grant rates. This view is reinforced by the further provision that the cash discount would be allowed on the delivered price less transportation

charges, and that changes in freight rates were for the account of the buyer.

The government bill of lading which was issued and used pursuant to this contract was in exactly the same pattern as the Jones & Laughlin bill of lading (R. 65, 67). It was issued by the Maritime Commission directly and stated that the goods were "the public property hereinafter described." It contained a certification identifying the contract, and *designating the "F. O. B. point named in contract" as Indiana Harbor,* with the added notation "freight allowed" (R. 65). As so filled out, the bill of lading was accepted, completed, and used by the Inland Steel Co. in contracting with the carrier for shipment as agent of the Maritime Commission. In evaluating these provisions of the written documents, even without considering the effect of other relevant circumstances, it is clear that, taken as a whole, the documents by themselves indicate overwhelmingly that the parties intended title to pass on shipment.

First, as the court below stated (R. 43–44), the provision for shipment on government bill of lading would normally indicate that the parties intended title to pass to the buyer upon delivery to the carrier at point of shipment. (The presumption so raised of course is not conclusive when title is obviously elsewhere (*United States* v. *Galveston, Harrisburg and San Antonio Ry.,* 279 U. S. 401; *Cross* v. *United States* (CCA 7, 1943), 133 F. 2d 183). The bill of lading and its peculiar mode of use indicate what the parties had in mind when they executed the purchase

order. Without a title transfer at shipping point the government bill of lading would have been pointless. *Cross* v. *United States, supra.*

Second, the contract itself quoted a delivered price *less transportation charges* and stipulated that changes in freight rates were for the account of the buyer. The government assumed responsibility for the transportation, changing the price to the shipping point basis, thereby showing intent to pass title upon delivery to the carrier, *as the court below concedes* (R. 44).

Third, the stipulation that the purpose of the government bill of lading was to take advantage of land-grant rates, without more, demonstrates the parties' true intent. It clearly shows that the seller as well as the buyer had in mind the very question before the court, and intended to arrange things so that the government could take advantage of the land-grant rates; this choice to be signified and accomplished by use of the special bill of lading. The failure of the court below to give any effect to this clause left it meaningless, but such a plain and unambiguous special provision may not be so ignored. It is not mere surplusage, it is a carefully worded clause having none of the earmarks of a form provision such as the provision reserving title in the seller. Unless it is to be summarily dismissed as meaningless, it can only mean that by shipment on government bill of lading the Maritime Commission exercised an option specifically given in the contract whereby it might take title at the seller's plant.

Fourth, the bill of lading used by the parties recited that the goods shipped were "public property," and the f. o. b. point designated therein was the shipping point. This was in accord with the option granted in the contract. It showed that the parties intended that if the government bill of lading were to be used, the f. o. b. point would be the shipping point. It should be emphasized that this bill of lading, with these recitals, was the sole privity between the carrier and the government, which hardly warrants the carriers' making claims contrary to its explicit language.

It may be urged, however, that besides protecting the delivered-price system there was another factor in the minds of the parties when they made the contracts with the title provisions included, viz., to leave the seller with a security title in the goods until they reached Los Angeles, for protection against failure of the buyer's credit. This would be, not until payment, but only for the days during the period of transportation. The fact that the buyer was the government made it irrelevant for even that brief period, since, once the goods were delivered, they were under exclusive government control, and the seller's reliance on being paid rested, not upon any title kept in the goods, but upon a contract with the government. The sellers showed that they surrendered all interest by allowing the shipment on the government bill of lading, thus severing themselves from any control over the goods while in transit. Nor did they retain title for the purpose of selecting railroad routes, as large industries like to do, for the bills of lading show that the choice of routes was the govern-

ment's. Nor was risk of loss in transit a consideration; the risk was on the buyer (f. o. b. means "free on board," denoting the point where risk transfers [4]). It made no difference in any case, because of the carrier's liability as insurer to the government under the bill of lading and steel is hardly a perishable.

No reason for the title provision can be found which is likely to have been in the parties' minds, other than the carry-over of a form designed to protect the delivered-price basis and possibly to preserve the *jus disponendi* while the goods were in transit. But the delivered-price basis was specifically rejected, the seller's hope for payment could not have been increased by preserving a security title for a few days, and the form provision must yield to the conclusive intention to complete the sales at the shipping points.

As against these controlling provisions, the court below held the provision reserving title in the seller until delivery in Los Angeles to be absolute—thus rejecting and rendering futile the other special provisions indicating intent to transfer title at shipping point. By so doing, the court thereby rejected the compelling circumstances and underlying reasons supporting the contrary intention of the parties themselves. Even though the contract provisions may not have been spelled out with entire precision and consistency, the contractors at least understood that the govern-

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[4] Benjamin on Sales, 7th American Edition (1899), p. 340. The risk would still be on the buyer even if the seller retained a security title. Uniform Sales Act, sec. 22 (a).

ment was to have land-grant rates by virtue of taking delivery—absolute and complete delivery—at the shipping point for shipment on government bills of lading, and that in deference to this the steel industry delivered-price policy was to be eliminated—however the carriers (who had no part) may now wish to reconstruct the transaction.

B. Alternatively, the contracts were modified later on, before shipment, so as to provide for title to pass at the shipping point. In any event, when the sellers delivered the goods to the carriers the contracts to sell in futuro developed into completed sales, by which title was actually transferred at such points.

The parties to a contract may of course modify it by mutual consent, regardless of self-imposed limitations in the original contracts. Where the contract is executory the consideration for the modifying agreement may rest in the mutual assent of the parties to the new agreement. The government's alternative view is that even if the District Court had been correct in holding the title provision as rigidly controlling in each of the original four contracts, nevertheless a modification occurred, effectively expressing their intent that the place of transfer should be the shipping points.

This was accomplished in each instance when (1) the Maritime Commission, acting through the Director of its Division of Purchase and Supply, issued the government bill of lading which identified the contract, described the goods as "public property," and designated the shipping point as the "F. O. B. point named in contract"; and (2) the seller accepted the bill of lading so certified for use in arranging the shipment.

If the modification did not then occur it occurred immediately thereafter, when the seller unconditionally appropriated specific goods to the contract by shipping them on bills of lading in favor of the buyer. The transaction then ceased to be a mere executory contract to sell *in futuro* and became a completed sale of goods.

Until the delivery of the goods to the carrier the relations of the parties were determined by the executory contracts to sell, either as originally drafted or as modified. "The American law fully agrees with the English that a delivery to a carrier, as directed by the purchaser, or as warranted by custom and usage, is such an appropriation as to bind the vendor, and make the goods the property of the vendee from the moment of such delivery, and the risk is thenceforth on him." Benjamin, *op. cit.* 351 (1899). Uniform Sales Act, sec. 22 (a). Had the seller wished to avoid this consequence of delivery to the carrier, preserving for itself the *jus disponendi,* it would have shipped the goods on a bill of lading in the seller's favor, thereby keeping the sale conditional instead of absolute. *Id.* 351. See *Id.* 4, 329–352. But by virtue of the unconditional appropriation and relinquishment, the goods left the seller's plant as property of the United States, being accepted as such by the carriers, who thenceforth looked solely to the Government for direction and for payment. Any former title reservation was supplanted by transfer to the Government which had complete control and could have diverted the goods, exactly as in the Jones & Laughlin shipments. If the goods never arrived at

Los Angeles at all, due to such diversion, the seller could not have asserted any continuing control or title. Indeed, as far as the seller was concerned, the goods had in effect reached "destination" when they were delivered and taken over by the initial carrier at the shipping point.

The foregoing analysis applies with equal force to the Carnegie, Otis, and Youngstown contracts. These also, like the Inland and the Jones & Laughlin contracts, contained formal clauses derived from the established commercial custom of the steel industry to sell on a delivered-price basis. The clauses provided a delivered price [5] and either reserved title until delivery "at the destination herein named" or provided that the goods were "the property of the seller" until delivered to the buyer at the buyer's fabricating point (R. 29, 33). Such form provisions for the reasons previously noted were thoroughly outweighed by the special provision providing that the government take the goods at the shipping point on a government bill of lading, *as was in fact done.*

II

Even assuming, arguendo, that title to each shipment remained in the seller, nonetheless the goods shipped were property of the United States within the meaning of Section 321 (a) of the Transportation Act of 1940

Even if the seller did retain title to the goods comprising each of the four disputed shipments until they

[5] Except the Youngstown contract, which alone had its price clause (but not its general conditions) specially adapted to meet the actual situation of an f. o. b. sale.

actually arrived at Los Angeles, the government is still entitled to the benefits accorded by Section 321 (a) of the Transportation Act of 1940. The right to lower rates reserved by this statute does not turn upon title. It is "the transportation of military or naval property of the United States moving for military or naval and not for civil use," for which land-grant rates are reserved. There is no doubt that the disputed shipments, as held by the court below, were military or naval property moving for military or naval and not for civil use. A consideration of the interests therein of seller, government, and carrier, particularly in view of the war situation, leads only to the conclusion that at least the *beneficial ownership and property interest in the material was in the United States.*

In considering this question it must be borne in mind throughout that this case concerns the interpretation of a legislative grant. In Section 321 (a) Congress granted to the companies operating land-grant railroads a right of enormous value, the right to double the net freight rates previously charged on the transportation of government property over land-grant mileage. That grant is the enacting clause of Section 321 (a), to which, however, Congress attached a proviso *reserving* the public right to the old rates on "military or naval property of the United States moving for military or naval and not for civil use."

In interpreting legislative grants of this kind, it is axiomatic that they will be construed most favorably to the government. *Charles River Bridge* v. *Warren*

Bridge, 11 Pet. 420, 36 U. S. 419. This is particularly necessary in the field of rights incident to railroad land-grants. "Such grants must be construed favorably to the Government * * * nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the Government." *Caldwell* v. *United States,* 250 U. S. 14, 20; *Great Northern R. Co.* v. *United States,* 315 U. S. 262.

In the view of the District Court, the grant to the carriers in Section 321 (a) should be construed, despite the proviso, as extending to the transportation of "military or naval property of the United States moving for military or naval use" the higher rate, if the seller, having surrendered all control, and having made delivery to the government at shipping point, had still retained a bare title.

This would be to construe the grant to the railroad companies broadly and the reservation to the public narrowly, quite against the established rules of construction laid down by the Supreme Court *for this very clause. Northern Pacific R. Co.* v. *United States,* 330 U. S. 248, 257 (1947). "But we are not limited to the lifeless words of the statute and formalistic canons of construction in our search for the intent of Congress. The Act was the product of a period, and courts, in construing a statute, may with propriety recur to the history of the times when it was passed." *Great Northern R. Co.* v. *United States, supra,* 273. In this aspect it would be quite unreasonable to hold that in enacting the Transportation Act of September 18, 1940, in the midst of the great armament program

which it was then simultaneously inaugurating, Congress did not intend the broad reservation in the proviso to include such shipments as these—goods accumulated, controlled, paid for, and put by the government to military and naval use—the precise situation to which Congress adverted in prescribing that land-grant rates be retained.

The Congressional purpose can be fulfilled only by classifying the shipments under the four particular contracts just as the District Court classified the Jones & Laughlin shipments and all the others. (See Table I, App.) All were equally destined to go into Liberty Ships, indisputably property of the United States, and were purchased and paid for by the United States as part of a military procurement program that was entirely a government function. Congress intended that such shipments move at land-grant rates, and the parties so agreed, for the legitimate purpose of saving government funds under the emergency war conditions; and it is sheer sophistry to seek to defeat the purpose of the statute by a technical reservation of title.[6]

It is familiar law that ownership is a bundle of rights, of which title is merely one of numerous indicia. *Standard Oil Co.* v. *Clark* (C. C. A. 2), 163 F. 2d. 917 (1947). In that case the court was confronted with the problem of determining the ownership of certain stocks, patents, and other property which in 1939, upon the outbreak of World War II,

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[6] Cf. *Cross* v. *United States*, 133 F. 2d 183, where the benefit from land-grant rates was to be for the seller.

were transferred by I. G. Farbenindustrie, A. G., the great pre-war German chemical trust, to American companies. In 1942 the Alien Property Custodian took the property on the ground that it was still property of I. G. Farben notwithstanding the 1939 transfers. In the course of its opinion, the Circuit Court of Appeals for the Second Circuit said (p. 929–930):

> If the problem must be visualized in terms of title as a unit, there are various precedents cited by the District Court which tend to support its view. * * * But we do not feel that it must be so regarded. The important question is whether the interests of plaintiffs are property interests of sufficient substance that plaintiffs may recover them from the Alien Property Custodian against the latter's contention that they are merely "executory contracts." To classify plaintiffs' or defendant's interests here, under one or more of the categories of "title," "equitable servitude in property," or "contractual right" does not settle the problem. The rights of both parties can be fitted into various of these categories. Indeed, the inveterate use of the labels "property" or "title" as group symbols, denoting a "bundle" of rights or other legal relations, is now well understood; it is only when we advance beyond these forms to the questions of degree, or of number and value of such rights, that we come to a solution of problems such as this. See 1 Restatement, Property, 1936, 3, 4, 10–12, 27–30; Hohfeld, Fundamental Legal Conceptions, 1923, 3, 12, 67 et seq.; 26 Yale L. J. 710, 712, 746; 28 Id. 721, 729; *Rohmer* v. *C. I. R.*,

2 Cir., 153 F. 2d 61, 64, certiorari denied 328 U. S. 862, 66 S. Ct. 1367, 90 L. Ed. 1632; *Morris Plan Industrial Bank of New York* v. *Schorn,* 2 Cir., 135 F. 2d 538, 540; authorities cited in Clark, Real Covenants, 2d Ed. 1947, 4, 30, 156.

In the context of this case, when these goods were shipped on government bill of lading designating them as public property, with the f. o. b. point at seller's plant, the beneficial ownership passed to the government; a transfer resembling at least an equitable conversion occurred, and the retention of a thin legal title (or a security interest, by whatever name) by the seller did not impede the transfer of the property in the goods along with control to the United States. This was sufficient to make them property of the United States within the meaning of section 321 (a). And even if the seller's title were more than an empty shell, this would still hold true.

> It has seemed hard for the courts to understand that both seller and buyer have incidents of ownership. It is too often apparently taken for granted that one party or the other must have title, and that the other can have only a contract right; yet the illustrations in the law of divided incidents of ownership are so numerous that there seems little excuse for misunderstanding. Equity has built up a whole system of jurisprudence based on the idea of one party having the legal title and the other the beneficial incidents of ownership; and it should not be supposed that the essential features of such a relation are peculiar to equity.

> A mortgage or a security title is not different in its nature when it relates to personal property and when it relates to land. Nor should it make any difference in the essential rights of the parties in what form the security title is held, whether by way of a purchase money mortgage, or a conditional sale, or a bill of lading running to the seller's order, or to the order of a banker who is financing the transaction for the seller (Williston on Sales, 2d Ed. (1924), Sec. 286–b).

As shown above, under the pressure of wartime emergency, formal provisions, representing practices long followed by the sellers in their ordinary commercial transactions, remained in the new wartime contracts with no actual purpose, as they were inapplicable to dealings with the Government. On the other hand, to effectuate the well-known governmental policy to utilize the benefit of land-grant rates, the parties overrode the form provisions by requiring that the "property" pass on delivery to the initial carrier, by shipping the goods on government bill of lading. The long-established policy and practice of the United States, known to all large shippers and carriers, has been to take title at as early a stage as possible, generally at the initial point of shipment, so as to ship on government bills of lading and derive the fullest advantage of land-grant reductions. *Illinois Central R. R.* v. *United States.* 265 U. S. 209. The practical construction by the sellers in shipping on government bill of lading alone should be dispositive. The Maritime Commission can hardly be suspected of having openly used government bills of lading for nongovernment property.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed insofar as it held that the shipments covered by government bills of lading Nos. MC–88579, MC–22992, MC–28270, and MC–34759 were not property of the United States at the time of shipment and entitled to land-grant rates under Section 321 (a) of the Transportation Act of 1940, and the District Court should be instructed to enter judgment for the United States in regard thereto.

Respectfully submitted.

H. G. Morison,
Assistant Attorney General,
James M. Carter,
United States Attorney,
Attorneys for the United States.

Of Counsel:

Edward H. Hickey,
Special Assistant to the Attorney General.
Armistead B. Rood,
Attorney, Department of Justice.

APPENDIX

TABLE I

Seller and Shipping Point	Contract or Purchase Order	Carrier's Freight Bill	Government Bill of Lading	District Court's Ruling on Freight Rate
Foster-Wheeler Corp., Carteret, N. J.	MCc-3173 (R. 23)	F-18436-3	MC-218872	Land-Grant.
Combustion Engineering Co. Inc., Chattanooga, Tennessee.	MCc (ESP)-1008 (R. 25)	F-10611-1	MC-21162	Land-Grant.
Inland Steel Co., Indiana Harbor, Ind.	MCc (ESP)-1520 (R. 26)	F-10503-12	MC-88579 (R. 65)	Commercial.
Carnegie-Illinois Steel Corporation, Munhall, Penna.	MCc (ESP)-1145 (R. 29)	F-10610-1	MC-229922 (R. 66)	Commercial.
Jones & Laughlin Steel Corporation, Pittsburgh, Penna.	MCc (ESP)-1016 MCc (ESP)-1083 (R. 30)	F-10610-1 F-10610-1	MC-19113 (R. 67)	Land-Grant.
Otis Steel Co., Cleveland, Ohio	MCc (ESP)-1837 (R. 32)	F-10540-1	MC-28270 (R. 68)	Commercial.
Youngstown Sheet & Tube Co., Youngstown, Ohio.	MCc (ESP)-2690 (R. 33)	F-10540-1	MC-34759 (R. 69)	Commercial.
Republic Steel Corp., Alabama City, Ala.	MCc-7300	F-21750-7	MC-411214 MC-411234 MC-411239 MC-411273	Land-Grant. Land-Grant. Land-Grant. Land-Grant.
Joshua Hendy Iron Works, Sunnyvale, California.	MCc (ESP)-1028 (R. 37)	F-10535-1	MC-16623 MC-16624 MC-16626 MC-16627 MC-16629	Land-Grant. Land-Grant. Land-Grant. Land-Grant. Land-Grant.
Joshua Hendy Iron Works, Sunnyvale, California	MCc (ESP)-1020 (R. 38)	F-11274-4	MC-37295 MC-37321 MC-37322 MC-37325 MC-37326	Land-Grant. Land-Grant. Land-Grant. Land-Grant. Land-Grant.

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No. 11843.

IN THE

United States Circuit Court of Appeals

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Appellee.

PACIFIC ELECTRIC RAILWAY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

REPLY BRIEF FOR THE PACIFIC ELECTRIC RAILWAY COMPANY.

FRANK KARR,
C. W. CORNELL,
E. D. YEOMANS,
670 Pacific Electric Building, Los Angeles 14,
Attorneys for Appellant and Respondent, Pacific Electric Railway Company.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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REPLY BRIEF FOR THE PACIFIC ELECTRIC RAILWAY COMPANY.

Statements of Facts.

No objection is made to the Statement of the Case contained in the Brief for the United States of America except as expressly mentioned herein.

The Brief, on page 3, states that the materials in question were for ships being constructed under the "United States Maritime Commission's essential War Emergency

Ship Construction program." The Stipulation of Facts referred to the ships as being constructed "for the United States Maritime Commission under the latter's ship construction program." [R. 15.] Many of the ships were constructed under what was known as the Emergency Ship Construction program. Objection to the word "War" in referring to the ship construction program.

Summary of Argument.

As to the materials shipped on bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759, the purchase contracts contained an express provision reserving title in the seller until delivery. Therefore, title was not in the Government at the time of shipment as to these materials. This is true in spite of shipment on Government bill of lading, and to reference on the bill of lading to an f. o. b. shipping point.

Use of a Government bill of lading and reference on the Government bill of lading to "public property" does not result in a transfer of title from the seller of the materials to the Government contrary to the purchase contracts.

In order to be "property of the United States" within the meaning of Section 321(a) of the Transportation Act of 1940, title must be in the United States during shipment. This is a well accepted meaning of the phrase as shown in the construction of these words in land-grant acts for many years.

ARGUMENT.

I.

Title Was Not in the Government at Time of Shipment as to Materials Shipped on Bills of Lading Nos. MC-88579, MC-22992, MC-28270, and MC-34759.

A. By the Express Terms of the Purchase Contracts, Title to These Materials Was Reserved in the Seller Until Delivery.

The Government's argument on this point is in substance that the Court should not consider what the parties actually provided in the contract in determining title, but should look to various collateral matters and infer from those matters directly contrary to the express conditions of the contract. In other words, the Government is attempting to apply to a contract having an express provision as to title rules that might be applicable in the absence of any provision as to title.

It is true that the basic rule of construction of a contract and in determining the question of when title passes, is the intention of the parties.

As stated in Williston on Sales, Second Edition, Volume 1, page 526, Section 261:

> "By intention in this connection is meant in the law of sales as throughout the law governing the formation of contracts, expressed intention."

Later in the same volume at page 596, Section 280, it is stated as to the various presumptions of title:

> "It must, therefore, constantly be borne in mind that the rules here spoken of, like others in the section of the Sales Act under consideration, are rules of presumption merely and will yield to proof of a contrary intention."

Certainly, this intention can best be expressed by the written provisions of the contract itself. In each of the cases involved, the purchase contract expressly reserved the title in the seller until arrival at destination.

On page 15 of the Brief, it is stated that the "District Court called this provision a 'manifest inconsistency'." This is a misstatement of the opinion of the District Court which stated on this point as follows (first referring to contract MCc(ESP)-1520):

> "To the contrary, however, the contract expressly provided that the seller's responsibility for delivery would not terminate until arrival of the material at destination and that: 'Title to all of the products covered by this order will remain in the seller until delivery thereof has been made to the buyer at the destination herein named.'
>
> "Contracts MCc(ESP)-1145, MCc(ESP)-1837 and MCc(ESP)-2690 also provided that all shipments were to be on Government bill of lading, but that title should remain in the seller until delivery at destination.
>
> "The usual *indicia* of intention become immaterial in the face of an express contractual provision reserving title in the seller during shipment.
>
> "The Government urges that the manifest inconsistency of reserving title in the seller and shipping by Government bill of lading is but an 'oversight'. Be that as it may, the law does not permit a court to read out of a contract language expressly reserving title in the seller until delivery at destination."

The Government implies that the inclusion of the provision reserving title was "an oversight." There is nothing in the record which would support such an implication,

and it must certainly be assumed that the parties intended what was provided in the contracts.

The Government on pages 16-19 of its Brief, attempts to show that the purchase contracts as to which the District Court held title was in the Government during shipment were similar to the ones which the District Court held title was not in the Government. Of course, the basic difference is that as to the four shipments as to which the District Court held title was not in the Government, the purchase contracts contained an express provision that title was to remain in the seller until delivery, and the purchase contracts as to the remaining shipments contained no such provision. In all questionable cases, the District Court held for the Government.

The Government concedes (Brief p. 20), as indeed it must, that shipment on a Government bill of lading is merely a presumptive indication of title, but still the Government argues that shipment on Government bill of lading is stronger evidence of title than an express provision of the contract.

The Government further argues that the fact that the Government was to assume responsibility for the transportation charges shows a definite intention on the part of the Government to take title. Although this might be some indication of title in the absence of a specific provision, there is nothing inconsistent between the Government's paying the transportation charges and not taking title until delivery. As a matter of fact, the Government had very little thought of obtaining land-grant rates on shipments for the Maritime Commission until long after all of these shipments were completed. The first real indication on the part of the Government that land-grant rates would be claimed on such shipments was in Decem-

ber, 1942, when the Maritime Commission passed its resolution, which appears on pages 73-74 of the Record. The Government makes a practice of assuming freight charges so that the seller will know what it is to obtain for its merchandise. The Government then assumes the obligation of paying the freight charges whether they are commercial rates or land-grant rates.

The Government makes further reference to a statement made in a preliminary proposal *as to one of the shipments involved,* which provides as follows [R. 28] which is referred to in the Government's Brief, page 6 and page 21:

> "This price is for material shipped to and including September 30, 1941, after which time the price will be the published price at Chicago, Illinois, in effect at the time of shipment, plus the all-rail freight rate to the three destinations."
>
> "If the Government wishes to take possession of this material at our plant and ship on Government Bills of Lading in order to take advantage of land grant freight rates, we will deduct the regular commercial freight rate, which at present is $1.10 per 100 lbs."

It should be noted that the letter mentioned was prior to the contract, and merely contained an alternate proposal which was not itself included in the contract. The mere reference to this letter in the purchase contract would certainly not overcome the express provision of the purchase contract as to title. Reference to the possibility of taking advantage of land-grant freight rates was either through overlooking the amendments contained in Section 321(a) of the Transportation Act of 1940 or not considering that the Maritime Commission was involved. At the time of this proposal not even the Government had any thought

of claiming that land-grant rates applied to shipments for the Maritime Commission.

The Government further makes reference to the provisions on the bill of lading as to "public property" and "f. o. b. point" as being the shipping point. As has been stated, the cases have held that shipment on Government bill of lading is not conclusive as to title of the shipment. The printed form merely refers to "public property." Reference to the f. o. b. point as the point of shipment in the bill of lading is merely some *indicia* of title in the absence of a provision in the contract. The contract having an express provision as to title, this could not determine title.

On page 22 of the Government's Brief, it is stated:

> ". . . It should be emphasized that this bill of lading, with these recitals, was the sole privity between the carrier and the government, which hardly warrants the carriers making claims contrary to its explicit language."

It should be noted that each of the bills of lading in question provided "CARRIER'S RIGHTS TO SHIPPING CHARGES NOT AFFECTED BY FACTS SET OUT IN THIS CERTIFICATE." This statement is further answered by the following portion of the opinion in the case of *Oregon-Washington Railroad & Navigation Company v. U. S.*, 65 L. Ed. 667, 255 U. S. 339 at 349, where it was held the railroad was not warranted in relying on a Government bill of lading as indicating that the property shipped was property of the United States:

> ". . . The mere mechanism of the bills of lading, or their false designations of the property transported, could not have imposed on anybody, certainly

not on 'the auditors and agents' of a railroad company, and the decisions of the Comptroller were as much open to dispute then as now, and resort to suit an inevitable prompting; and yet, we have seen, the Statute of Limitations was permitted to interpose its bar. The excuse of appellant is hard to credit. Its 'auditors and agents' were not ignorant of affairs, nor unpracticed in the controversies of business, and the means of their settlement. The auditors and agents of railroad companies are not usually complaisant to denials of the rights of the companies they represent. We do not say this in criticism, for such is their duty,—the necessary condition of their places."

The Government in its Brief, page 23, states that the risk of loss was on the buyer during shipment. The purchase contracts expressly provided otherwise. (See Government's Brief pp. 5-8.) Provision that the risk of loss is on the seller until delivery is consistent with title remaining in the seller until delivery.

No reason can be found for not having title in the seller during the shipment. After the enactment of the Transportation Act of 1940, no one thought of claiming that shipments by the Maritime Commission were entitled to land-grant rates. It was stated in the resolution of the Maritime Commission dated December 4, 1942 [R. 74]:

"Whereas, prior to the entry of the United States into the present war on December 8, 1941, there was no basis for a determination by the Commission as of the time of transportation of any such materials, equipment and supplies that upon completion any particular vessel or group of vessels would be devoted primarily to the purposes of war rather than to the purposes of commerce; . . ."

The Government has at no time claimed land-grant rates on shipments which were made by the Maritime Commission at the time these purchase contracts were made (between June 20, 1941 and November 27, 1941). As stated by the Court [R. 45] "The record here indicates that it was not until December, 1942, that the Maritime Commission thought of claiming land-grant rates" and in its resolution of December 4, 1942, the Maritime Commission claimed land-grant rates only on those shipments title to which passed to the Government after December 8, 1941 [R. 74-75]. It was perfectly natural that in this situation the sellers would follow their normal business practices and the Government would have no reason to request any modification of such practices.

Further, the Government argues on pages 23-24, that as the contractors knew the Government was to have land-grant rates, the parties must have intended title to be in the Government. As mentioned, not even the Government, at the time of purchase, had any thought of claiming land-grant rates on the shipment of the materials purchased. In fact until the last of 1942, the Government paid full commercial rates on shipments for the Maritime Commission.

The real substance of the Government's argument is that it now appears to have been unwise to have provided in these contracts that title should remain in the seller until delivery at destination. As has been mentioned, it was not even known at the time these contracts were made that the Government would make any claim to land-grant rates.

Now that the land-grant question has arisen, the Government would like to make a different contract than it actually made.

The terms of the purchase contract as actually made must be applied and it follows that the title to these shipments was not in the United States at time of shipment.

B. Shipment on Government Bill of Lading Did Not Effect a Change in Title Before Delivery.

The Government contends that even though the original purchase contract provided that title was in the seller until delivery, that this contract was subsequently modified by the issuance of a Government bill of lading and the seller's accepting the bill of lading for use in making the shipment.

This is merely another way of stating the argument heretofore made by the Government that shipment on Government bill of lading resulted in title being in the Government. As has been stated and admitted by the Government, this fact is merely presumptive evidence of title and does not overcome an express provision as to title. It follows that as it does not control title in the first instance, it certainly would not change the status as to title at a later time. If this were not so, no shipment on Government bill of lading could be other than a shipment of Government property. In the case of *Louisville & Nashville Railroad v. United States,* 267 U. S. 395, 69 Law Ed. 678, it was held that in spite of shipment on Government bill of lading title was not in the United States during the shipment, and the shipment was not property

of the United States. Certainly, the Government would not contend that the mere notation on the bill of lading designating the shipping point as the "f. o. b. point named in the contract" changed this situation. In an opinion of the Comptroller General where a notation on the bill of lading showed the destination point as the f. o. b. point, it was stated in opinion reported in 17 Comptroller General Opinions 978, dated May 25, 1938:

> "The insistence that these materials were not property of the United States appears to be rested mainly on the fact that the bills of lading issued for the transportation service have notations indicating that the materials were purchased f.o.b. destination. The question, however, as to when the title to the goods in question passed to the United States is governed by the intention of the parties to the contract of purchase and the mere fact of a notation on the bills of lading in this connection is not controlling on that question."

It is argued at various places by the Government (pp. 17, 22, 32), that shipment on Government bill of lading changed the title provision of the purchase contracts. It is to be noted that each of the purchase contracts provided for shipment on Government bill of lading [R. 27-28, 29, 32, 33]. Therefore, shipment on a Government bill of lading indicates no intention to change the provisions of the purchase contracts.

In several places in the Government's Brief it is claimed or suggested that the Government had complete control of

these goods and could have diverted them to other destinations. (See pages 18, 22 and 25.) For example, see page 25, where it is stated:

> "Any former title reservation was supplanted by transfer to the Government which had complete control and could have diverted the goods, exactly as in the Jones & Laughlin shipments."

In purchase orders MCc(ESP)-1837 and MCc(ESP)-2690 it is expressly provided:

> "The goods covered herein are the property of the Seller until delivered to the Buyer at the Buyer's fabrication point [Los Angeles] herein specified and shall not be diverted or reconsigned without permission of the Seller" [R. 33].

The mere notation on a bill of lading as to the f.o.b. point named in the contract does not overcome an express provision in the purchase contract as to title.

The various references by the Government, on page 25 of its Brief, to the Uniform Sales Act as upholding the contention that delivery of goods to the carrier indicates an intention to pass title at that time, are all applicable to situations where the purchase contract has no provision in regard to the time of passage of title. In this case, where the contract had an express provision on this question, the situation is entirely different. There is no question that the express provision of the contract must control over the mere *indicia* of title.

II.

If Title Was Not in the United States at the Time of Shipment, the Government Is Not Entitled to Land-Grant Rates Under the Provisions of Section 321(a) of the Transportation Act of 1940.

The Government argues that even though title of the shipments in question remained in the seller during the shipment, nevertheless, the goods shipped were "property of the United States" within the meaning of Section 321(a).

This contention on the part of the Government is contrary to the long accepted meaning of the phrase "property of the United States" as used in the various land-grant statutes. In the case of *Louisville & Nashville Railroad Company v. United States,* 267 U. S. 395, 69 L. Ed. 678 at 680, it was stated:

> ". . . Under the land-grant acts, the United States was entitled to the reduced rates if the coal, when hauled, was its property. Acts of May 17, 1856, June 3, 1856, and March 3, 1857, 11 Stat. at L. 15, 17, 200, chaps. 31, 41, 103; Acts of April 10, 1869, and March 3, 1871, 16 Stat. at L. 45, 580, chaps. 24, 123; Act of March 3, 1875, 18 Stat. at L. 509, chap. 171; Illinois C. R. Co. v. United States, 265 U. S. 209, 68 L. ed. 983, 44 Sup. Ct. Rep. 485. But the mere use of government forms of bills of lading is not conclusive on the question of ownership of property at the time of transportation, and does not give the United States the right of transportation at land-grant rates. See Transportation Involved in Furnishing Articles by Contractor, 20 Comp. Dec. 721, 723."

It was further stated at page 402:

> "The conclusion that the coal furnished the Tonopah was to be delivered at the mine is not sustained

> by the facts found. Under the invitation to bid, proposal and acceptance, delivery was to be made alongside the vessel at Pensacola. The coal was transported on government bills of lading. The United States paid the freight, less land-grant deductions. The use of government bills of lading and the payment of reduced charges by the United States are not sufficient to sustain a finding that the coal was the property of the United States when hauled by appellant. There is nothing to indicate that title passed before delivery at the vessel."

In reaching its decision, the Supreme Court in the *Louisville* case determined whether the particular shipment was "property of the United States" within the meaning of the land-grant acts at that time by determining whether the title to the shipment was in the United States during the time of the shipment.

In *Illinois Central R. Co. v. United States,* 265 U. S. 208, 68 L. Ed. 983, the Court stated the issues of the case as follows:

> "The question in the case is whether, in certain shipments of property for use by the United States, title to the property passed at the place of shipment or at the place of delivery. Or, to state the question another way, whether the shipments while in transit were the property of the United States, and properly transported at land-grant rates, or did not become the property of the United States until after receipt at destination and subject to commercial rates. . . ."

It is clear from the above that the Court considered that whether the shipment was "property of the United States" depended on whether title was in the Government during the shipment.

In the case of *United States v. Galveston, H. & S. A. R. Co.,* 279 U. S. 401, 73 L. Ed. 760, it was held that the Government was not entitled to land-grant rates on the transportation of officers' mounts. The Court stated the contention of the Government, 73 L. Ed. at 761:

> "The United States concedes that it is liable for such transportation; but it insists that applicable statutory provisions and army regulations show that it has a property interest in the horses and the right to require the officers to use them in discharge of their duties; that they are the property of the United States within the meaning of the Land Grant Acts, and that therefore it is entitled to the reduced rates."

The Court further stated at 761 and 762:

> "In Alabama G. S. R. Co. v. United States, 49 Ct. Cl. 522, it was held that when not actually in the service of the United States the men in the National Guard of a state transported upon proper government requisition for participation by authority of the Secretary of War in the encampment, manoeuvers, and field instruction of a part of the regular Army are not 'troops of the United States.' And see United States v. Union P. R. Co., 249 U. S. 354, 63 L. ed. 643, 39 Sup. Ct. Rep. 294. In Oregon-Washington R. & Nav. Co. v. United States, 58 Ct. Cl. 645, the court held that the effects, household goods, etc., and authorized mounts of Army officers on change of stations, are not government property within the purview of such acts. And in Oregon-Washington R. & Nav. Co. v. United States, 255 U. S. 339, 345, 65

L. ed. 667, 669, 41 Sup. Ct. Rep. 329, this court held that the personal baggage of an officer is not property of the United States entitled to transportation at land grant rates.

"We are of opinion that the principle of these decisions is controlling here. The United States demands service from its army officers which requires the use of things furnished by them. But it does not own and, as between it and them, it does not claim to own, hold or have any property rights in the uniforms, manuals, clothes, private mounts or other things by them furnished and used in the service. It would be unreasonable to hold valid the government's claim of ownership asserted merely to secure land grant rates for the transportation of such mounts. The construction contended for is without support and cannot be sustained."

It is clear from the above cases, it has always been held that whether a shipment is "property of the United States" depends on whether or not title of the shipment is in the Government. As title to the shipments in question were not in the Government, land-grant rates are not applicable.

The earlier decisions of the Supreme Court holding that the question whether or not a shipment might be considered "property of the United States" depended on the title of the shipment, must have been accepted by Congress in the enactment of the Transportation Act of 1940 and the same interpretation of the phrase must be followed in construing Section 321(a) of the Transportation Act of 1940.

Conclusion.

Insofar as the District Court held that materials shipped on bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759 were not "property of the United States" within the meaning of Section 321(a) of the Transportation Act of 1940, the judgment should be affirmed.

Respectfully submitted,

FRANK KARR,
C. W. CORNELL,
E. D. YEOMANS,

Attorneys for Appellant and Respondent, Pacific Electric Railway Company.

No. 11843

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

PACIFIC ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLEE

PACIFIC ELECTRIC RAILWAY COMPANY, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

CLOSING BRIEF FOR THE UNITED STATES

H. G. MORISON,
Assistant Attorney General,
JAMES M. CARTER,
United States Attorney,
Attorneys for the United States.

Of Counsel:
EDWARD H. HICKEY,
Special Assistant to the Attorney General,
ARMISTEAD B. ROOD,
Attorney, Department of Justice.

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AUTHORITIES CITED

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INTRODUCTORY STATEMENT

The opening brief of the United States as appellant was confined to argument in support of the Government's appeal from the District Court's decision that the goods composing four of the twenty-one shipments involved in the action were not "property of the United States" at the time of carriage and that the four shipments, therefore, failed to meet one of the

two qualifications for land-grant freight rates provided in Section 321 (a) of the Transportation Act of 1940.[1]

The United States submits this closing brief in answer to the Pacific Electric Railway Company's opening brief on its cross-appeal. This closing brief supports the decision of the District Court that all twenty-one shipments did meet the other qualification for land-grant rates in Section 321 (a) by virtue of the fact that all of the goods shipped were "military or naval property moving for military or naval and not for civil use" within the meaning of that section. The District Court held that seventeen of the shipments, being property of the United States, met both qualifications and were entitled to land-grant rates.

QUESTION PRESENTED BY CROSS-APPEAL

Whether all of the twenty-one shipments of component materials and parts for Liberty Ships moving on consignment to the United States Maritime Commission under Government bills of lading constituted "the transportation of military or naval property * * * moving for military or naval and not for civil use" within the meaning of Section 321 (a) of the Transportation Act of 1940, and therefore (if also "property of the United States" within the meaning of the same section) were entitled to be moved at the reduced land-grant rates.

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[1] The District Court's opinion is reported at 71 F. Supp. 987.

SUMMARY OF ARGUMENT

I

The goods composing each of the shipments were "military or naval property moving for military or naval and not for civil use" within the meaning of Section 321 (a) of the Transportation Act of 1940, as that phrase was construed by the Supreme Court last year in *Northern Pacific Ry. Co.* v. *United States,* 330 U. S. 248. The shipments in every respect meet the test there laid down by the Court, and that decision is controlling here.

The shipments were made by and delivered to the United States Maritime Commission for use by California Shipbuilding Corporation, a cost-plus contractor with the Commission, in building cargo ships of the "Liberty" design for the Commission. At the time of the shipments, these Liberty Ships were being constructed for a military or naval use. They were built for the United States in time of war to win the war. All the shipments herein of their component parts occurred after December 7, 1941, following the Japanese attack on Pearl Harbor. The applicable rates are to be determined as of the time of carriage; the use to which the goods were to be put was governed by the critical and emergency condition then existing when construction of the ships was for military rather than merely commercial purposes. The parts transported therefore partook of the military or naval character and purpose of the ships. They

were military or naval property within the meaning of Section 321 (a) of the Act. Any doubt about this should be resolved in favor of the Government, for Section 321 (a) was a legislative grant of a valuable public right to private interests, in which ambiguities are to be resolved in favor of the grantor. *Northern Pacific Ry. Co.* v. *United States, supra.*

The test in this case should not be confused with the very different test of the scope of "commerce" under the Fair Labor Standards Act. Under the definitions in that Act, a shipment of munitions belonging to the Army for military use in battle was "commerce." Of course, it was also, like the goods involved herein, military or naval property of the United States, moving for military or naval use and entitled to land-grant rates under Section 321 (a). To hold otherwise with respect to the shipments herein would emasculate the decision of the Supreme Court in the *Northern Pacific* case.

II

The goods, while being transported by railroad, were also "property of the United States." The present situation is analogous to that presented by an old postal case (*Searight* v. *Stokes,* 3 Howard 150), in which United States mail was held to be "property of the United States" and eligible for free transportation without toll over the Old Cumberland Road, even though the United States technically did not have title to the articles being transported.

ARGUMENT

I

The goods shipped were military or naval property moving for military or naval use within the meaning of section 321 (a) as construed by the Supreme Court in the Northern Pacific opinion

All parties concede that the goods composing seventeen of the shipments involved in this litigation were "property of the United States" at the time of carriage. The question now posed is whether they, as well as the goods in the other four shipments, were "military or naval property moving for military or naval and not for civil use." The District Court, finding the decision of the Supreme Court in *Northern Pacific Railway Company* v. *United States, supra,* controlling on this point, held that all twenty-one shipments met this qualification and that the seventeen (being property of the United States) were entitled to move at the reduced rates reserved in Section 321 (a) of the Transportation Act. This ruling was clearly correct and is indeed compelled by the holding of the Supreme Court in the *Northern Pacific* case.

The facts are agreed. The shipments were made and delivered to the United States Maritime Commission for use by the California Shipbuilding Corporation, a cost-plus contractor with the Commission, in building cargo ships of the "Liberty" design for the Commission (R. 21). The programming for this new ship construction was made after consultation with the Joint Chiefs of Staff; of the 2,610 Liberty

Ships constructed for the Maritime Commission up to 1945, the California Shipbuilding Corporation delivered 336 (R. 20).

Comparison of the present shipments with the controverted shipments in the *Northern Pacific* case shows no significant difference. In the latter case the shipments involved five types of property, all of which were held entitled to the reduced rates reserved in the statute. One shipment most directly similar to the present one involved copper cable, which was described by the Court in the following terms:

> *Copper cable.*—Copper cable was transported to Tacoma, Washington, for use in the installation of degaussing equipment (a defense against magnetic mines) on a cargo vessel being so built that it might readily be converted into a military or naval auxiliary. The work was done by a contractor under contract with the Maritime Commission. The degaussing specifications were furnished by the Navy which also furnished the equipment and bore the cost. *The vessel was delivered in 1941 and was operated as directed by the Maritime Commission or the War Shipping Administration. Whether it operated as a cargo vessel or as a military or naval auxiliary does not appear.* (*Id.,* p. 249.) [Italics added.]

In the present case, the goods shipped were component parts of hulls and engines for cargo ships which were also being constructed by a contractor for the Maritime Commission on a design which made the ship convertible as a military or naval auxiliary

(R. 17). The parts in question were variously described in the government's bills of lading as condensers, power boilers and fixtures, steel plates, sheets, angles and channels, and engine parts. All the shipments were consigned to the Maritime Commission in care of the cost-plus contractor at Los Angeles, for assembly into ships under the Emergency Ship Program (R. 84). The copper cable in the *Northern Pacific* case was to be used in "degaussing equipment" to protect a cargo ship from magnetic mines. Concededly, this was an important part of a Liberty Ship in wartime, but surely not more important than the hull or the engine for which the steel plates and parts composing the shipments in the present case were to be used.

It is true that the copper cable was shipped by the Navy Department, whereas the hull and engine parts in the present case were shipped by the Maritime Commission, a civilian agency, but the Supreme Court pointed out that this difference was of no consequence.

> The theory is that "military or naval" property means only property shipped by or under control of the Army or Navy.
>
> We see no merit in that suggestion. Section 321 (a) makes no reference to specific agencies or departments of government. The fact that the War or Navy Department does the procurement might, of course, carry special weight or be decisive in close cases. But it is well known that procurement of military supplies or war material is often handled by agencies other than

the War and Navy Departments. *Procurement of cargo and transport vessels by the Maritime Commission is an outstanding example.* See Merchant Marine Act of 1936, § 902, 49 Stat. 2015–2016, as amended, 46 U. S. C., § 1242.

* * * * *

Civilian agencies may service the armed forces or act as adjuncts to them. The Maritime Commission is a good example. *An army or navy on foreign shores or in foreign waters cannot live and fight without a supply fleet in their support. The agency, whether civil or military, which performs that function is serving the armed forces. The property which it employs in that service is military or naval property, serving a military or naval function* (Id., p. 252–3). [Italics added.]

1. The Liberty ships under construction for the Maritime Commission were military or naval property for military or naval use

There can be no doubt that Liberty ships were built as instruments of war. In times of war or impending war, the Merchant Marine has always been regarded at home and abroad as an auxiliary of the Army and the Navy to support their striking force. See Admiral Ernest J. King's *Third and Final Report to the Secretary of the Navy, United States Navy at War, 1941–1945*, p. 169; Robert Earle Anderson, *The Merchant Marine and World Frontiers* (1945), (pp. 140–142, 143); Col. Randolph Leigh, *48 Million Tons to Eisenhower,* (1945). Liberty ships were not built under the long-range program (46 U. S. C. Sec. 1120)

or under the construction differential subsidy (46 U. S. C. Sec. 1151). They were not built for prospective purchasers, but for the United States, and under conditions of grave emergency to win a war.[2]

It is important to bear in mind that *every shipment in this case occurred after December 7, 1941,* following the Japanese attack on Pearl Harbor.[3] All the ship-

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[2] Compare the statement of Commissioner Raymond S. McKeough, Maritime Commission, Hearings before the Committee on the Merchant Marine and Fisheries, H. R., 79th Cong., 2d Sess., on H. R. 3603, June 4, 1946, p. 18:

"We have 2,500 so-called Liberty ships. I hope that we will be able to sell some of them. They are not built for commercial purposes. I hope that the Congress understands that. They were built to win a war. They were built to carry war cargo—as much of it as they could put in the holds of the ships, to bring it to the place to be used for our armed forces. There are 2,500 of them. I doubt there will be very much in the way of recovery of money as a result of the sale of these ships."

[3] Attached to p. 38 of plaintiff's brief is a table showing the dates of the shipments. These dates appear in the sixth column of the table under the heading, "Date of Consignment," as follows:

Contract	*Date of Shipment*
Foster-Wheeler	January 26, 1943.
Combustion Engineering	December 16 & 17, 1941.
Inland Steel	December 9, 1941.
Carnegie	December 29, 1941.
Jones & Laughlin	January 6, 1942.
Otis Steel	December 21, 1941.
Youngstown Sheet & Tube	December 22, 1941.
Republic Steel	May 16 to 31, 1943.
Joshua Hendy	December 17, 1941, to January 1, 1942.
Joshua Hendy	February 23 to April 6, 1942.

The contractors are correlated with the contract numbers in the table at page 34 of the opening brief of the United States as appellant.

ments moved when the Nation was in a World War, under the critical and emergency conditions caused by a war shipping shortage. Whatever the declaration of policy may have been in the Merchant Marine Act of 1936, whatever any intervening committee reports might have stated, it is certain that on the dates of the shipments, the over-riding purpose and intent was to get Liberty Ships constructed as fast as possible in order to support our military and naval effort effectively. (See United States Maritime Commission, *Annual Report, 1945,* p. 3.)

Plaintiff's opening brief labors to construe a non-military intent from the various appropriation acts. An appropriation act to break a bottleneck in ocean shipping with a World War at our shores is not less effective because its terminology lacks sabre-rattling stridence. Actually, two of the Acts were specifically designated, "Defense Aid Supplemental Appropriation Act" (Act of March 27, 1941, 55 Stat. 53) and "First Supplemental National Defense Appropriation Act" (Act of August 25, 1941, 55 Stat. 669) and this evidences an understanding that military considerations controlled the Emergency Program for the construction of these Liberty Ships.[4] With the impact of Pearl Harbor, the nice distinctions drawn by the plaintiff between the Merchant Marine Act of

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[4] Even the Merchant Marine Act of 1936 placed the military purpose first. Its first words were, "*It is necessary for the national defense.* * * *" (49 Stat. 1985, 46 U. S. C., Sec. 1101).

1936, the Act of February 6, 1941, the Act of March 27, 1941, and the Act of August 25, 1941, could no longer be made.

Clearly, at the time when the goods herein were transported, they all were moving for the military ends to which they were adaptable. Plaintiff's opening brief (p. 38) correctly states the rule that, *"The rates applicable to a shipment are determined as of the time the shipment is delivered to the carrier."* That is the time that controls, and at that time the use to which the property was to be put was surely military or naval. History had moved beyond the confines of the pre-war intent which plaintiff would infer from earlier statutes, committee reports, and statements before Congressional committees running as far back as 1936.

Nor does plaintiff challenge the expedience, prudence, and necessity of the governmental expenditures. They were administratively determined as required for military or naval purposes by the appropriate executive agency. The Maritime Commission determined by resolution adopted December 4, 1942, that all shipments after December 7, 1941, under its programs were of military property for military use. *Cf.* 21 Comp. Gen. 137 (plaintiff's opening brief, appendix p. 34). It disclaimed reduced freight rates on property shipped after "VJ-Day", September 1, 1945, by resolution adopted July 2, 1946. The Maritime Commission resolution of December 4, 1942, attests the good faith and responsibility of the Com-

mission in ascertaining whether the shipments were military property:

> * * * Prior to the entry of the United States into the present war on December 8, 1941, there was no basis for a determination by the Commission as of the time of transportation of any such materials, equipment and supplies that upon completion any particular vessel or group of vessels would be devoted primarily to the purposes of war rather than to the purpose of commerce; * * *

After that date, however,

> * * * it became apparent that all merchant vessels then in the process of construction and thereafter to be constructed until the termination of the present war were to be devoted primarily to the purposes of war, rather than to the purposes of commerce * * *[5]

Executive determinations of that character bear at least a *prima facie* validity.

The category of "military property" is elastic, varying with the times. It was broadest when a nation like the United States was mobilizing for and waging a global war on a scale beyond all historic precedent. The concept of military property is not a lifeless abstraction but eminently practical and

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[5] Plaintiff states incorrectly that this was the first official action of the Maritime Commission claiming that shipments of parts for cargo ships qualified for land-grant rates (Opening Brief, p. 31). Compare the Foster-Wheeler bill of lading, which stated that the goods to be shipped thereunder were "military or naval property of the United States moving for military or naval and not for civil use" and was issued by the Maritime Commission September 23, 1942, the statement quoted having been affixed by a rubber stamp (**R.** 23). Some of the other bills of lading were similarly stamped (**R.** 21, 23, 34).

sensitive to the march of events and the demands of modern war. Goods procured by the Government on a military basis for purposes of security to support the Army and Navy at war, were military or naval in character and purpose.

> Indeed, the nature of modern war, its multifarious aspects, the requirements of the men and women who constitute the armed forces and their adjuncts, give military or naval property such a broad sweep as to include almost any type of property. More than articles actually used by military or naval personnel in combat are included. Military or naval use includes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, all property which serves their many needs or wants in training or preparation for war, in combat, in maintaining them at home or abroad, in their occupation after victory is won. It is the relation of the shipment to the military or naval effort that is controlling under § 321 (a). (*Northern Pacific* opinion, *supra,* p. 254–5).

2. The component parts and materials for the Liberty ships were also military or naval in character and purpose

Whatever doubts that may have existed on this score have been set at rest by the *Northern Pacific* opinion. There, the railroad company argued that even if emergency cargo ships built by the Maritime Commission were military or naval in their nature and purpose, the same could not be said of materials and parts therefor, since they were merely supplied

"for manufacture and construction which are civilian pursuits and which were here in fact performed by civilian contractors. Only the completed product, not the component elements, was, in that view, for military or naval use" (*Id.* p. 254). The Supreme Court rejected that contention, saying:

> It is also suggested that the property covered by the exception in § 321 (a) is confined to property for ultimate use directly by the armed forces. *Under that view materials shipped for the construction of vessels for the Maritime Commission and used to service troops at home or abroad would not be "military or naval" property. We likewise reject that argument.*
>
> * * * * *
>
> The property in question may have to be reconditioned, repaired, processed or treated in some other way before it serves their needs. But that does not detract from its status as military or naval property. *Southern Pacific Co.* v. *Defense Supplies Corp.,* 64 F. Supp. 605. Within the meaning of § 321 (a) an intermediate manufacturing phase cannot be said to have an essential "civil" aspect, when the products or articles involved are destined to serve military or naval needs. It is the dominant purpose for which the manufacturing or processing activity is carried on that is controlling (*Id.* 253, 255). [Italics added.]

Measured by that test there can be no question that the present shipments of the component parts of the cargo ships were military or naval property moving for military and naval use under Section 321 (a) of the Act.

The cases defining "Commerce" within the meaning of the Fair Labor Standards Act cited by the plaintiff in its opening brief (pp. 32–35) have no relevance. The plaintiff discusses the decision in *St. John's River Shipbuilding Co.* v. *Adams,* 164 F. (2d) 1012 (C. C. A. 5), a suit under the Fair Labor Standards Act for overtime pay, which held that employees constructing Liberty Ships for the United States at a Government-owned shipyard, using only Government-owned materials and tools, were engaged in the production of goods for "commerce." The suggestion is that if a Liberty Ship is "for commerce," *ipso facto* it is not "for military or naval use" under Section 321 (a) of the Transportation Act. This suggestion of mutually exclusive categories is quite unsound.

"Commerce" is defined in the Fair Labor Standards Act to mean:

> Trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof. (Sec. 3 (b), 29 U. S. C. Sec. 203 (b)).

In construing this definition, the Supreme Court has recognized that it was the purpose of the Fair Labor Standards Act to extend its control "throughout the farthest reaches of the channels of interstate commerce." *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 567. That Act required the maintenance of labor standards in the production of goods to be transported by the Government for war use no less than if the goods were for nonwar use. Accordingly, the courts have held that not only the manufacture of Liberty Ships, but "the manufacture of shells, explosives, and

munitions for the armed forces, under a cost-plus-fixed-fee contract with the United States Government" is production of goods for "commerce". *Bell* v. *Porter,* 159 F. (2d) 117 (C. C. A. 7), cert. den. 330 U. S. 813.[6] Thus, in the *St. John's River Shipbuilding* case, the court was merely following the established interpretation of the concept of commerce within the meaning of the Fair Labor Standards Act. It was quite correct to hold that the manufacture of shells, explosives, and munitions for the armed forces was for commerce—*even though the goods were military property of the United States,* which, when shipped by rail, would of course also be entitled to land-grant freight rates as "military or naval property moving for military or naval and not for civil use" within the meaning of Section 321 (a) of the Transportation Act. Since goods, therefore, can be at the same time "for commerce" under the Fair Labor Standards Act and simultaneously "for military or naval use" under the Transportation Act, the Fair Labor Standards cases are irrelevant to the interpretation of Section 321 (a).

On April 30, 1948, this irrelevance was specifically pointed out by the United States District Court for the Southern District of California. In *Devine* v. *Joshua Hendy Corporation* (Central Division No.

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[6] See, also, *Ware* v. *Goodyear Engineering Corp.*, 11 Labor Cases (S. D. Ind.) par. 63,204: *Moehl* v. *duPont de Nemours & Co.*, 12 Labor Cases, (N. D. Ill.), par. 63,545; *Timberlake* v. *Day & Zimmerman*, 49 F. Supp. 28 (S. D. Iowa); *Lasater* v. *Herculas Powder Co.*, 73 F. Supp. 264 (E. D. Tenn.); *Bumpus* v. *Remington Arms Co., Inc.*, 74 F. Supp. 788 (W. D. Mo.); *Jackson* v. *Northwest Airlines, Inc.*, 75 F. Supp. 32 (D. Minn.).

6176–Y, 14 C. C. H. Labor Cases, Par. 64,496), Judge Yankwich held that construction of cargo ships and assault troop ships for the Government during the war was for "commerce" within the scope of the Fair Labor Standards Act, and he carefully distinguished the criteria of commerce under that Act from the criteria of Section 321 (a) of the Transportation Act. While under the *Northern Pacific* opinion the ships were classifiable as military or naval property for military or naval use, he deemed that fact quite irrelevant to the Fair Labor Standards Act and entirely compatible with a classification "for commerce" under the latter Act.

Lastly, as pointed out in the opening brief of the United States as appellant (pp. 27–29), whatever ambiguities may exist in Section 321 (a) should be resolved in favor of the United States. By enacting that section, Congress bestowed the legislative grant of an extremely valuable public right to private companies operating land-grant railroads. Therefore, under the established canon of statutory construction, any ambiguity is to be resolved in favor of the grantor. The Supreme Court was very clear about this in the *Northern Pacific* opinion:

> Petitioner also contends that § 321 (a) is a remedial enactment which should be liberally construed so as to permit no exception which is not required. Cf. *Piedmont & N. Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311–312. But it is a familiar rule that where there is any doubt as to the meaning of

a statute which "operates as a grant of public property to an individual, or the relinquishment of a public interest," the doubt should be resolved in favor of the Government and against the private claimant. *Slidell* v. *Grandjean,* 111 U. S. 412, 437. See *Southern Ry. Co.* v. *United States,* 322 U. S. 72, 76. That rule has been applied in construing the reduced rate conditions of the land-grant legislation. *Southern Pacific Co.* v. *United States,* 307 U. S. 393, 401; *Southern Ry. Co.* v. *United States, supra.* That principle is applicable here where the Congress, by writing into § 321 (a) an exception, retained for the United States an economic privilege of great value. The fact that the railroads, including petitioner, filed releases of their land-grant claims in order to obtain the benefits of § 321 (a) is now relied upon as constituting full consideration for the rate concession. It is accordingly argued that the railroads made a contract with the United States which should be generously construed. Cf. *Russell* v. *Sebastian,* 233 U. S. 195, 205. The original land-grants resulted in a contract. *Burke* v. *Southern Pacific R. Co.,* 234 U. S. 669, 680. Yet, as we have seen, they were nonetheless public grants strictly construed against the grantee. The present Act, though passed in the interests of the railroads, was *in essence merely a continuation of land-grant rates in a narrower category. Therefore, it, too, must be construed like any other public grant* (330 U. S. 248, 257). [Italics added.]

"The Act was the product of a period, and courts, in construing a statute, may with propriety recur to the history of the times when it was passed." *Great*

Northern R. Co. v. *United States,* 315 U. S. 262, 273. By reserving land-grant rates in the Transportation Act, enacted on September 18, 1940, Congress intended to save public funds in the vast mobilization program for defense which Congress was then contemplating and undertaking.

II

The goods composing these shipments were property of the United States

No extensive comment is required in reply to the argument by plaintiff on this point, in its opening brief (pp. 41–44), and little need be added to what was stated on this subject in our opening brief. The cases cited by plaintiff (p. 41)[7] are not controlling adversely to the United States, for reasons already argued in our opening brief.

The Supreme Court in *Illinois Central R. Co.* v. *United States,* 265 U. S. 209, 214, characterized a parallel situation most aptly:

> The Government dealt with the consignors as if the property was its—dealt with the Railroad Company as if the property was its, the Government's, and, as we have seen, the Railroad Company dealt with the Government on that assumption, and the contractors dealt with it on that assumption. The incidental regulations between it and the contractors cannot divest that

[7] *United States* v. *Galveston, Harrisburg & San Antonio Railway Company,* 279 U. S. 401; *Oregon-Washington Railroad & Navigation Company* v. *United States,* 255 U. S. 339; *Henry H. Cross Co.* v. *United States,* 133 F. (2d) 183 (C. C. A. 7); *Illinois Central Railroad Company* v. *United States,* 265 U. S. 208; *Louisville & Nashville Railroad Company* v. *United States,* 267 U. S. 395.

> ownership in the interest of the Railroad Company.

A suggested analogy is found in the old postal case of *Searight* v. *Stokes,* 3 Howard 150. The scope of the term "property of the United States" came up in the following way. In 1831, Pennsylvania appropriated funds to take over and maintain the Cumberland Road. The Pennsylvania statute provided for collection of tolls, with this proviso:

> That no toll shall be received or collected for the passage of any wagon or carriage laden with the *property of the United States,* or any cannon or military stores belonging to the United States, or to any of the States comprising this Union (*Id.* p. 164). [Italics added.]

The question was whether tolls could be charged for wagons laden solely with the United States mail. In an opinion by Taney, C. J., the Supreme Court held that mail was "property of the United States" even though the United States lacked title in the technical sense (*Id.* 168). This early interpretation of the phrase was in connection with the rights of the United States to transportation privileges over routes constructed with public aid. This is the very context in which the same phrase was used in Section 321 (a).[8]

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[8] A new development sheds further light on the clauses in the Carnegie, Inland, Otis, and Youngstown sales contracts purporting to reserve title in the seller. The opening brief for the United States as appellant (pp. 16–17, n. 3) pointed out that the true function of those form-clauses was to protect the basing-point delivered-price system in the steel industry developed from "Pittsburgh plus," for commercial sales. The importance of that consideration is emphasized by a current press report. On July 8,

CONCLUSION

For reasons stated in the opening brief of the United States as appellant, the shipments were property of the United States. Accordingly, the appeal of the United States should be sustained and the District Court reversed in its ruling which denied land-grant rates on four of the shipments on the ground that they were not "property of the United States" within the meaning of Section 321 (a).

For reasons stated in this brief, all of the goods shipped were military or naval property moving for military or naval use within the meaning of Section 321 (a) as interpreted in the *Northern Pacific* case. Accordingly, the plaintiff's cross-appeal should be dismissed.

1948, the *New York Herald Tribune* contained a leading news item (pp. 1, 31) beginning (after the headlines) as follows:

"A new steel price system which may upset the price scale for all heavy industry and conceivably could force relocation of some of the nation's greatest manufacturing centers was announced yesterday by the United States Steel Corporation.

"Abandoning a price method in general use for more than fifty years in the steel industry, the corporation said that it is going to sell steel on an f. o. b. mill basis. Heretofore the industry has adhered to the so-called basing-point system, in which steel companies have absorbed some of the freight delivery costs in order to meet competition when selling to customers far removed from steel-producing centers.

"In his statement announcing the change, Benjamin F. Fairless, president of U. S. Steel, made no attempt to mitigate the 'hardships and dislocations' in store for industry. The step, he said, was forced by a Supreme Court decision outlawing the basing-point price system in the cement industry . . ."

See *Federal Trade Commission v. Cement Institute et al.*, 333 U. S. — (Nos. 23–34, April 26, 1948).

Respectfully submitted.

H. G. MORISON,
Assistant Attorney General,
JAMES M. CARTER,
United States Attorney,
Attorneys for the United States.

Of Counsel:

EDWARD H. HICKEY,
Special Assistant to the Attorney General.
ARMISTEAD B. ROOD,
Attorney, Department of Justice.

U. S. GOVERNMENT PRINTING OFFICE: 1948

No. 11843

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PACIFIC ELECTRIC RAILWAY COMPANY, a Corporation,

Appellee.

PACIFIC ELECTRIC RAILWAY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the District Court of the United States for the Southern District of California, Central Division.

SUPPLEMENTAL BRIEF FOR PACIFIC ELECTRIC RAILWAY COMPANY.

FRANK KARR,
C. W. CORNELL,
E. D. YEOMANS,
670 Pacific Electric Building, Los Angeles 14,
Attorneys for Pacific Electric Railway Company.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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UNITED STATES OF AMERICA,

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vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL BRIEF FOR PACIFIC ELECTRIC RAILWAY COMPANY.

During argument of the appeal in the above matter, question was raised as to the connection between the freight shipments described in the petition and certain of the bills of lading specifically referred to in the judgment. In order to clarify this question, the Court granted Pacific Electric Railway Company leave to file a supplemental brief.

When Pacific Electric Railway Company submitted bills covering the freight shipments described in the petition,

the Government made certain deductions from these freight bills based on alleged overpayments of prior freight bills. This was done pursuant to Section 322 of the Transportation Act of 1940, which provides as follows:

> "Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

If these prior bills were overpaid, the deductions from the subsequent bills were proper and Pacific Electric Railway Company should not recover the deducted amounts in this proceeding. If the deductions were improper, Pacific Electric Railway Company should recover these amounts. Therefore, the propriety of these deductions becomes a material issue in this case.

At the time of trial, it was agreed between the parties that the issues as set forth in the stipulation of facts were the issues to be decided in this case. This is shown in the following portion of the record on page 60:

> "The Court: Are you agreed, gentlemen, that the case will be tried now upon the issues as raised by the stipulation on file?
>
> Mr. Yeomans: That is perfectly agreeable to the plaintiff.
>
> Mr. Margolies: And likewise to the defendant."

The stipulation referred to is set forth in the record on pages 14 to 40. This stipulation of facts traces in detail the connection between the shipments as contained in the petition and the shipments on which deductions were made. There were four carrier's bills referred to in the petition, being carrier's bills Nos. F-18436-3, F-26475-1, F-21750-7 and F-27095-2.

Bill No. F-18436-3 was for $1,093.39, which was the full commercial rate. The Government paid the land-grant rate of $717.99, and the difference of $375.40 is the amount in dispute. [R. 23-24.]

Bill No. F-26475-1 was for $3,272.81, which was the full commercial rate. The Government paid $212.70 cash and deducted $3,060.11 for claimed overpayments on prior bills, these deductions being the difference between the commercial rate and the land-grant rate on the shipments in the prior bills. Pacific Electric Railway Company agreed that $706.75 of the $3,060.11 deducted was proper, leaving a balance of $2,353.36 in dispute. Four of the shipments on which these deductions were based were the shipments which the District Court awarded judgment for Pacific Electric Railway Company in the amount of $1,143.66 on the ground that title to the materials shipped was not in the Government at the time of shipment, these four shipments being covered by Government bills of lading Nos. MC-88579, MC-22992, MC-28270 and MC-34759. [R. 24-34.]

Bill No. F-21750-7 was for $13,778.46 which was the full commercial rate. The Government paid $7,547.26 cash, deducted $918.58 for claimed overpayments of prior bills, and disallowed $5,312.62 which is the difference between land-grant rates and full commercial rates. Pacific

Electric Railway Company agreed that the deduction of $918.58 was proper, leaving amount in dispute of $5,312.62. It should be noted that there is a difference of $3.91 between the amount prayed for in the petition and this amount. It was found after filing the petition that an error had been made in computation of the proper rate in regard to this bill, and the stipulation set forth the correct amount. [R. 34-35.]

Bill No. F-27095-2 was for $1,776.44 which was the full commercial rate. The Government paid $874.00 cash and deducted $902.44 for claimed overpayments of prior bills. This $902.44 deduction was the difference between the commercial rate and land-grant rates on shipments in two prior bills, and is the amount in dispute. [R. 36-39.]

The findings of fact in this case found that the facts contained in the stipulation were true. The stipulated facts included not only the facts alleged in the petition but also the additional facts which are necessary to decide the case. All of the matters included in the judgment arose directly from the matters contained in the petition.

Respectfully submitted,

FRANK KARR,
C. W. CORNELL,
E. D. YEOMANS,
Attorneys for Pacific Electric Railway Company.

EXHIBIT

Carrier's Bills in Petition	Amount Billed	Amount Paid	Amt. Deducted For Claimed Overpayment on Prior Bills	Amount of Deduction Carrier Agreed Was Correct	Prior Bills As to Which Carrier Disputes Deductions	Amount In Dispute	Bill of Lading Number of Items in Dispute	Purchase Contract Number	Seller and Shipping Point
F-18436-3	$ 1,093.39	$ 717.99				$ 375.40	MC-218872	CD-MC-42-110 (MCc-3173)	Foster-Wheeler Corp., Carteret, N. J.
F-26475-1	$ 3,272.81	$ 212.70	$3,060.11		F-10611-1	600.51	MC-21162	MCc-(ESP)-1008	Combustion Engineering Company, Inc., Chattanooga, Tenn.
					F-10503-12	* 321.02	MC-88579	MCc-(ESP)-1520	Inland Steel Co., Indiana Harbor, Ind.
					F-10610-1	* 201.89	MC-22992	MCc-(ESP)-1145	Carnegie-Illinois Steel Corp., Munhall, Pa.
					F-10610-1	609.19	MC-19113	(MCc-(ESP)-1016 (MCc-(ESP)-1083	Jones & Laughlin Steel Corp., Pittsburgh, Pa
				$ 706.75	F-10540-1	* 420.02	MC-28270	MCc-(ESP)-1837	Otis Steel Co., Cleveland, Ohio
					F-10540-1	* 200.73	MC-34759	MCc-(ESP)-2690	Youngstown Sheet & Tube Co., Youngstown, Ohio
F-21750-7	$13,778.46	$7,547.26	$ 918.58	$ 918.58		$5,312.62	MC-411214 MC-411234 MC-411239 MC-411273	PD-MC-43-10664 (MCc-7300)	Republic Steel Corp., Alabama City, Ala.
F-27095-2	$ 1,776.44	$ 874.00	$ 902.44		F-10535-1	$ 496.69	MC-16624 MC-16623 MC-16626 MC-16627 MC-16629	MCc-(ESP)-1028	Joshua Hendy Iron Works, Sunnyvale, Calif.
					F-11274-4	405.75	MC-37295 MC-37321 MC-37322 MC-37325 MC-37326	MCc-(ESP)-1020	Joshua Hendy Iron Works, Sunnyvale, Calif.
						$8,943.82			

* Indicates shipments as to which trial court held for plaintiff on the ground that they were not the property of the United States at the time of shipment.

No. 11844

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of C. A. REED FURNITURE COMPANY, a corporation, Bankrupt,

Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States for the Southern District of California Central Division

---

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

No. 11844

IN THE

United States Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

McLAUGHLIN, McGINLEY & HANSON
JAMES A. McLAUGHLIN
FRANK C. WELLER

1224 Bank of America Building
650 South Spring Street
Los Angeles 14, Calif.

For Appellee:

W. R. WALLACE, JR.
W. R. RAY
JOSEPH MARTIN, JR.
WILLIAMSON & WALLACE

Suite 1111, 310 Sansome Street
San Francisco 4, Calif.

MUSICK, BURRELL & INGEBRETSEN

1075 Subway Terminal Building
Los Angeles 13, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

In the District Court of the United States
Southern District of California
Central Division

No. 7747-Y

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of C. A. REED FURNITURE COMPANY, a corporation, Bankrupt,

Plaintiff,

vs.

CALIFORNIA BANK, a corporation, and LAWRENCE WAREHOUSE COMPANY, a corporation,

Defendants.

AMENDED COMPLAINT TO RECOVER PREFERENCES AND DAMAGES FOR CONVERSION OF PERSONAL PROPERTY OF THE BANKRUPT AND FOR AN ACCOUNTING

Comes now plaintiff and for a first cause of action against defendants, and each of them, alleges:

I.

That at all times herein mentioned, C. A. Reed Furniture Company has been a corporation organized, existing and doing business under the laws of the State of California, with its principal place of business in the City of Los Angeles, County of Los Angeles, State of California; that on the 11th day of July, 1947, a voluntary Petition in Bankruptcy was filed in the above entitled Court, and the C. A. Reed Furniture Company on said date was adjudicated a bankrupt by the above entitled Court; that on the 30th day of July, 1947, at the first meeting of the creditors of the said bankrupt which was held before the

Honorable [2] Hubert F. Laugharn, Referee in Bankruptcy, to whom the said matter had theretofore been duly referred, plaintiff herein, Paul W. Sampsell, was duly elected Trustee in Bankruptcy for said bankrupt estate and filed his bond and qualified as such Trustee and has at all times since said date been and now is the duly qualified and acting Trustee in Bankruptcy for the bankrupt estate of C. A. Reed Furniture Company, a bankrupt; that reference to said bankrupt herein shall mean C. A. Reed Furniture Company.

II.

The defendant, California Bank, is now and at all times herein mentioned has been a banking corporation organized, existing and doing business under the laws of the State of California with its principal office and place of business in the City of Los Angeles, County of Los Angeles, State of California.

III.

The defendant, Lawrence Warehouse Company, is now and at all times herein mentioned has been a corporation organized, existing and doing business under the laws of the State of California with its principal office and place of business in the City of Los Angeles, County of Los Angeles, State of California.

IV.

The grounds upon which the jurisdiction of this Court depends are that this is an action brought under the provisions of the National Bankruptcy Act relating to preferences and transfers of property by a bankrupt in fraud of creditors (Title 11, U. S. C. A., Sections 96(a), 96(b), 107(a), 107(e) and 110(e)), for the purpose of recovering property transferred by the bankrupt in fraud

of its creditors to the defendants under circumstances constituting a recoverable preference and for the purpose of having an accounting as to the amount of the preferential payments made to the defendant California Bank, both [3] subsequent to and within the four-month period prior to the filing of the bankruptcy petition in said bankruptcy proceeding.

V.

Between the period from September 23, 1946, to May 3, 1947, the bankrupt borrowed moneys from the defendant California Bank and executed promissory notes to defendant California Bank evidencing each of such loans. That each of said promissory notes bore interest at the rate of six (6%) per cent per annum and interest thereon was paid to May 1, 1947, and the principal on each of such promissory notes was payable on demand. That the date, principal amount, and unpaid principal balance on each of said promissory notes on June 26, 1947 was as follows:

Amount	Date	Unpaid Balance
$19,580.00	9-24-46	$15,340.86
16,400.00	9-13-46	16,400.00
8,250.00	9-4-46	8,250.00
6,000.00	7-18-46	6,000.00
7,624.96	6-5-46	7,624.96
8,020.00	6-6-46	8,020.00
15,000.00	4-22-46	4,246.22
19,081.33	5-31-46	19,081.33
5,000.00	5-2-47	5,000.00

That the total unpaid principal balance on said notes, as of June 26, 1947, and as of July 3, 1947, was $89,963.37.

VI.

During the period between a date on or about the 23rd day of September, 1946, and May 3, 1947, the said bankrupt caused to be delivered to defendant California Bank certain warehouse receipts more particularly hereinafter described as security for the payment of the indebtedness described under Paragraph V hereinabove. The said warehouse receipts were signed and issued by defendant Lawrence Warehouse Company, and [4] there is attached hereto and marked Exhibit "A", a copy of one of said warehouse receipts. That all of the said warehouse receipts were identical in form except that they covered different merchandise, and each was individually numbered and bore the date on which such warehouse receipt was issued. That the said warehouse receipts were respectively numbered as follows: Nos. W 61090, W 61091, W 61092, W 63028, W 69670, W 70009, W 70017, W 70062, W 70064, W 70069, W 71303, W 71310, W 71325, W 71643, W 71646, W 72454, W 72458, W 72461, W 72462, W 72463, W 72465, W 72466, W 72767, W 72468, W 72469, W 72471, W 72472, W 72473, W 72474, W 72475, W 72926, W 72927, W 72928, W 72929, W 72930, W 72931, W 72932, W 72933, W 72934, W 72935, W 72937, W 72938, W 72939, W 72940, W 72941, W 72942, W 72943, W 72944, W 72945, W 72946, W 72947, W 72948, W 72949, W 72950, W 72951, W 72952, W 72953, W 72954, W 72955, W 72956, W 72957, W 72958, W 72959, W 72960, W 72961, W 72962, W 72963, W 72964, W 72965, W 72966, W 72967, W 72969, W 72970, W 72971, W 72972, W 72973, W 72975, W 72976, W 72977, W 72978, W 72979, W 72980, W 72981, W 72982, W 72983, W 72984, W 72985, W 72986, W 72987, and W 72989.

That the said warehouse receipts purported to cover inventory and merchandise of the bankrupt, and that from time to time after the issuance of such warehouse receipts, and prior to the 3rd day of July, 1947, portions of such merchandise were released by defendants to the bankrupt. That there is attached hereto and marked Exhibit "B", a list of all the inventory and merchandise which was covered by and described in the said warehouse receipts. That prior to the 3rd day of July, 1947, defendants released to the bankrupt a portion of the inventory and merchandise described under said Exhibit "B", and the portion of such merchandise and inventory so released is listed and described in the schedule attached hereto and marked [5] Exhibit "C". That all of the said merchandise and inventory covered by and described in said warehouse receipts was at all times herein mentioned located in the City of Los Angeles, County of Los Angeles, State of California. That each of the said warehouse receipts bears endorsements upon it indicating the merchandise which was respectively released under each such warehouse receipt and delivered to the bankrupt prior to the 3rd day of July, 1947.

VII.

That the said bankrupt was at all times herein mentioned the owner of all of the merchandise and inventory described in said warehouse receipts and described in Exhibit "B" attached hereto. That the reasonable market value of all of said inventory and merchandise has been at all times herein mentioned the sum of $83,808.00.

VIII.

Prior to the issuance of the warehouse receipts hereinabove described, the bankrupt and defendant Lawrence

Warehouse Company signed purported leases whereby the bankrupt purported to lease to defendant Lawrence Warehouse Company certain space in the bankrupt's premises at 4424 East 49th Street, and at 2030 Bay Street, in Los Angeles, California, and such space was partitioned off from the space in each of said premises used by the bankrupt. Plaintiff is informed and believes, and upon such information and belief alleges that all of the merchandise and personal property described in said warehouse receipts was at all times since the date of the issuance of the warehouse receipts respectively covering such merchandise and personal property, and up to the time of its delivery to defendant California Bank on or about the 3rd day of July, 1947, as hereinafter alleged, kept and maintained in the enclosed portions of the bankrupt's premises covered by said purported [6] leases from the bankrupt to defendant Lawrence Warehouse Company; that each of the purported leases from the bankrupt to defendant Lawrence Warehouse Company covering said space contained the following provision:

> ". . . with the appurtenances, together with the full right of ingress and egress to and from said premises, over and through any other premises of the lessor, to be occupied for the conduct of a field warehouse on a tenancy from month to month, and until said tenancy shall be terminated by a thirty (30) day written notice given by either party to the other, for the aggregate rental of One Dollar ($1.00), the receipt of which is hereby acknowledged; provided, that no notice of termination by lessor shall become effective unless all warehouse receipts, or other evidence of the storage, representing commodities stored in or on said premises, or any part there-

of, issued by lessee shall have been surrendered to lessee and cancelled, and all charges of lessee due or to become due in connection with the operation of such warehouse shall have been fully paid.";

that prior to the issuance of such warehouse receipts, defendant Lawrence Warehouse Company designated one or more of the bankrupt's employees as the defendant Lawrence Warehouse Company's watchmen and caretakers, and instructed each of such persons to watch and care for the merchandise and personal property described in said warehouse receipts, and not to permit the bankrupt or anyone else to remove any such merchandise or personal property without the consent of defendant Lawrence Warehouse Company; that the said employees so designated as watchmen for defendant Lawrence Warehouse Company were at all times thereafter paid their salaries by defendant Lawrence Warehouse Com- [7] pany, and the bankrupt periodically reimbursed defendant Lawrence Warehouse Company for the salaries so paid by such defendant to such employees; that each of such employees continued at all times to perform the same services for the bankrupt which each such employee had been performing for the bankrupt prior to such employee's designation as a watchman for defendant Lawrence Warehouse Company, and continued to take and receive instructions from the bankrupt with respect to the performance of all such services; that such persons so designated as watchmen by defendant Lawrence Warehouse Company were the only persons, other than defendant Lawrence Warehouse Company and its officers and employees, who had keys to the entrances to the partitioned-off space where such merchandise and personal property was kept and maintained.

IX.

None of the warehouse receipts referred to in this amended complaint, at the time of their issuance, or at any time, contained any statement as to the rate of storage per month or season, or as to any rate of storage charges being charged by or to be paid to defendant Lawrence Warehouse Company, as required by the laws of the State of California, or at all. (Section 1858(b) and 1858(f), Civil Code, and Act 9059, General Laws). That each of the said warehouse receipts was at all times void, invalid and of no force and effect.

X.

That on the 3rd day of July, 1947, the defendant California Bank purported to sell all of the properties described under Exhibit "B", with the exception of the properties released to the bankrupt, as listed and described in Exhibit "C", to itself at a pledgee sale, and on said date, said defendant California Bank took possession and control of all of the said merchandise and personal property, and defendant [8] Lawrence Warehouse Company delivevered its possession and control of said merchandise and personal property to defendant California Bank.

XI.

Plaintiff is informed and believes, and upon such information and belief alleges that subsequent to the 3rd day of July, 1947, the defendant California Bank has sold and disposed of the merchandise and personal property and has received and kept for its own use and benefit the proceeds and moneys received from such sale.

XII.

Plaintiff is informed and believes, and upon such information and belief alleges: That the defendants and

each of them have at all times since a date on or about the 11th day of March, 1947, had reasonable cause to believe that the said bankrupt was insolvent; that at all times since a date prior to the 11th day of March, 1947, said bankrupt has been insolvent within the meaning and provisions of the National Bankruptcy Act; that at all times since a date prior to the 11th day of March, 1947, the aggregate of the bankrupt's property taken at a fair valuation has been insufficient to pay and discharge all of the bankrupt's debts; that at all times since a date prior to March 11, 1947, the reasonable market value of all of the bankrupt's property and assets and all of the bankrupt's cash has never at any time been sufficient to pay and discharge all of the bankrupt's debts existing at any time since a date prior to March 11, 1947; that the transfer of the property and merchandise covered by said warehouse receipts to defendant California Bank, and the acquisition of the same by defendant California Bank, as herein alleged, has enabled defendant California Bank to obtain a greater percentage in payment of the indebtedness owing by the bankrupt to it than other creditors [9] of the bankrupt of the same class as defendant California Bank have obtained or will obtain; that defendants and each of them have at all times since a date on or about the 11th day of March, 1947, known and have had reasonable cause to believe the existence of all of the facts alleged under this Paragraph XII.

XIII.

Plaintiff is informed and believes, and upon such information and belief alleges that at the time of the filing by the bankrupt of its petition in bankruptcy, it was indebted on account of wages due workmen of the bankrupt

and earned within three months prior to the filing of said bankruptcy petition in an amount in excess of $6,000.00; that at such time the bankrupt was indebted to the United States on account of unpaid taxes in an amount in excess of $13,000.00; that at such time the bankrupt was indebted to the State of California in an amount in excess of $7,900.00 on account of unpaid unemployment taxes and sales taxes; that at said time the bankrupt was indebted to the County of Los Angeles on account of unpaid taxes assessed against the bankrupt's property in an amount in excess of $10,700.00; that at said time the bankrupt was indebted to the City of Los Angeles on account of unpaid license taxes and city sales taxes in the amount of $117.96; that at said time the bankrupt was indebted on accounts receivable to trade creditors in an amount in excess of $76,000.00; that at said time the said bankrupt was indebted on account of trade acceptances and notes payable to persons other than defendant California Bank and the Reconstruction Finance Corporation, in an amount in excess of $60,000.00; that the aggregate indebtednesses of the bankrupt at the time of the filing of the petition in bankruptcy was in excess of $173,717.96; and that said amount does not include any indebtedness of the bankrupt to the defendant California Bank, or to any other creditor of the [10] bankrupt having or claiming any security for its indebtedness. That the total property, assets, and moneys of the bankrupt, excluding any claims and causes of action to recover preferences such as the cause of action set forth herein is not in excess of $25,000.00. That there has come into the hands of plaintiff properties, assets, and moneys of the bankrupt in an amount not exceeding $25,000.00, and that unless plaintiff recovers the preferences herein sought

to be recovered, together with preferences which plaintiff is seeking to recover in another action in the above entitled court against defendants Reconstruction Finance Corporation and Lawrence Warehouse Company, there will not be sufficient assets to discharge the debts of the bankrupt which have priority.

XIV.

That plaintiff has been damaged by the loss and conversion of the said inventory and merchandise in the sum of $83,808.00. That although plaintiff has demanded that defendants pay the said sum to plaintiff, defendants have failed, neglected, and refused to pay the same or any part thereof.

For a Second, Separate, and Distinct Cause of Action Against Defendant California Bank, Plaintiff Alleges:

I.

Plaintiff repeats, readopts and realleges each and every allegation contained in Paragraphs I, II, and IV of the first cause of action herein.

II.

That during the period between March 11, 1947 and July 11, 1947, the date of the filing of the bankruptcy petition, the defendant California Bank loaned and advanced to the bankrupt various sums of money and received from the bankrupt as security for such loans warehouse receipts covering merchandise [11] and inventory belonging to the bankrupt, and that during said four-month period, defendant California Bank released merchandise covered by such warehouse receipts to the said bankrupt upon receiving payments from said bankrupt on account of such loans, and that during said four-month

period, defendant California Bank received moneys from the bankrupt in payment of principal on said loans. That the amount of such moneys so received by defendant California Bank exceeded the reasonable market value of merchandise and inventory released by defendant California Bank to the bankrupt on account of such payments by a sum in excess of $13,787.00. That the plaintiff does not know the dates or amounts of each of such loans, nor the dates or the amounts of each cash payment made by the bankrupt to the California Bank during said four-month period. That plaintiff does not know the descriptions, quantities, or exact values of merchandise released to the bankrupt by defendant California Bank during said four-month period for the reason that the records relating to the same are in the possession of defendant California Bank. That plaintiff has requested of defendant California Bank that it furnish plaintiff with all of such information in order that plaintiff could determine the exact amount of moneys which defendant California Bank has received during said four-month period from the bankrupt, and in consideration of its releasing such merchandise and inventory in excess of the value of merchandise and inventory released from said warehouse receipts to the bankrupt during said period. That defendant California Bank has failed, neglected, and refused to furnish plaintiff with such information, and that an accounting is necessary to determine the exact amount of preferential payments received by defendant California Bank during said four-month period in connection with releases of inventory and merchandise which said defendant held as collateral security [12] for loans made by it to the bankrupt.

III.

Plaintiff is informed and believes, and upon such information and belief alleges: That the defendants and each of them have at all times since a date on or about the 11th day of March, 1947, had reasonable cause to believe that the said bankrupt was insolvent; that at all times since a date prior to the 11th day of March, 1947, said bankrupt has been insolvent within the meaning and provisions of the National Bankruptcy Act; that at all times since a date prior to the 11th day of March, 1947, the aggregate of the bankrupt's property taken at a fair valuation has been insufficient to pay and discharge all of the bankrupt's debts; that at all times since a date prior to March 11, 1947, the reasonable market value of all of the bankrupt's property and assets and all of the bankrupt's cash has never at any time been sufficient to pay and discharge all of the bankrupt's debts existing at any time since a date prior to March 11, 1947; that the receipt by defendant California Bank of the said moneys in excess of the reasonable value of merchandise and inventory released by such defendant to the bankrupt has enabled defendant California Bank to obtain a greater percentage in payment of the indebtedness owing by said bankrupt to it than other creditors of the bankrupt of the same class as defendant California Bank have obtained or will obtain; that defendant California Bank has at all times during the period that it received such excess moneys known and had reasonable cause to believe the existence of all of the facts as alleged under this Paragraph III.

IV.

Plaintiff repeats, readopts and realleges each and every allegation contained in Paragraph XIII of his first cause of action herein. [13]

For a Third, Separate, and District Cause of Action Against Defendant California Bank, Plaintiff Alleges:

I.

Plaintiff repeats, readopts, and realleges each and every allegation contained in Paragraphs I, II, and IV of the first cause of action herein.

II.

That during the period between March 11, 1947, and July 11, 1947, the date of the filing of the bankruptcy petition, the defendant California Bank loaned and advanced to the bankrupt various sums of money and received from the bankrupt as security for such loans pledges of accounts receivable payable to the bankrupt. That defendant California Bank has collected on account of said accounts receivable moneys in excess of the moneys which the California Bank loaned to the bankrupt during said four-month period. That plaintiff is informed and believes, and upon such information and belief alleges that the moneys so collected by defendant California Bank during said four-month period in excess of loans made by defendant California Bank during said period are in excess of Forty Thousand Dollars ($40,000.00), and that defendant California Bank has accounts receivable so pledged and assigned to it by the bankrupt in the sum of approximately Fourteen Thousand Dollars ($14,000.00) which defendant California Bank is seeking to collect, and which said California Bank will receive from the debtors on such accounts receivable.

That plaintiff does not know the exact amount of moneys loaned by defendant California Bank to the bankrupt during said four-month period, nor the total value or descriptions of accounts receivable received by said California Bank, as pledgee, to secure such loans during said four-month period. That plaintiff does not know the full amount of moneys collected [14] by defendant California Bank on account of such pledges of accounts receivable, nor the full amount of such pledged accounts receivable that remain unpaid, for the reason that all such information is in the possession of the defendant California Bank. That plaintiff has requested that defendant California Bank furnish plaintiff with such information, but the defendant California Bank has failed, neglected, and refused to furnish the same to plaintiff. That an accounting is necessary to determine all such matters, and to determine the amount collected by defendant California Bank on account of pledged accounts receivable during the four-month period preceding the filing by the bankrupt of its bankruptcy petition, and to determine the amount by which such collections exceed the amount of loans made by the defendant California Bank during said four-month period to the bankrupt, and also to determine the value of such pledged accounts receivable which have not been thus far collected by defendant California Bank.

III.

Plaintiff is informed and believes, and upon such information and belief alleges: That the defendants and

each of them have at all times since a date on or about the 11th day of March, 1947, had reasonable cause to believe that the said bankrupt was insolvent; that at all times since a date prior to the 11th day of March, 1947, said bankrupt has been insolvent within the meaning and provisions of the National Bankruptcy Act; that at all times since a date prior to the 11th day of March, 1947, the aggregate of the bankrupt's property taken at a fair valuation has been insufficient to pay and discharge all of the bankrupt's debts; that at all times since a date prior to March 11, 1947, the reasonable market value of all of the bankrupt's property and assets, including accounts receivable, and all of the bankrupt's cash has never at any time been [15] sufficient to pay and discharge all of the bankrupt's debts existing at any time since a date prior to March 11, 1947; that the receipt by defendant California Bank of the moneys collected from such accounts receivable in excess of loans made by defendant California Bank during said four-month period for which such accounts receivable were assigned has enabled defendant California Bank to obtain a greater percentage in payment of the indebtedness owing by said bankrupt to it than other creditors of the bankrupt of the same class as defendant California Bank have obtained or will obtain; that defendant California Bank has at all times during the period that it received such excess moneys known and had reasonable cause to believe the existence of all of the facts as alleged under this Paragraph III.

IV.

Plaintiff repeats, readopts and realleges each and every allegation contained in Paragraph XIII of his first cause of action herein.

Wherefore, plaintiff prays judgment against defendants and each of them as follows:

1. That plaintiff do have and recover from defendants and each of them the sum of $83,808.00 upon his first cause of action;

2. That defendant California Bank be required to account to plaintiff by reason of the transactions described under his second and third causes of action herein, and that plaintiff recover of and from defendant California Bank such amount as such accounting may show that the defendant California Bank received as preferential payments during the four-month period preceding the filing of the bankrupt's bankruptcy petition; [16]

3. That plaintiff recover his costs herein, and such other relief as to the court may seem just and proper.

FRANK C. WELLER and
JAMES A. McLAUGHLIN
By James A. McLaughlin
Attorneys for Plaintiff [17]

LAWRENCE WAREHOUSE COMPANY

COPY OF WAREHOUSE RECEIPT NO W 72462

INSURED
SEE TERMS AND CONDITIONS ON REVERSE HEREOF

LOS ANGELES, CALIFORNIA DATE FEBRUARY 27, 1947

STORED FOR G. A. REED FURNITURE COMPANY

STORAGE IN LOS ANGELES, CALIF. WAREHOUSE NO. 165

STORED AT 2030 Bay STREET

SUBJECT TO ALL THE TERMS AND CONDITIONS CONTAINED HEREIN AND ON THE REVERSE HEREOF FOR THE ACCOUNT OF AND TO BE DELIVERED WITHOUT SURRENDER OF THIS WAREHOUSE RECEIPT UPON WRITTEN ORDER OF

CALIFORNIA BANK

MARKS AND NOS.	NO. UNITS	SAID TO BE OR CONTAIN	NET WEIGHT LBS.	EXTENDS ON OR UNIT VALUES
	665½ lbs	#5 Springs	10	665 50
	127 "	#6 "	10	12 70
	2275 "	#8 "	20	227 50
	13,000 yds	3" White webbing 2/½ Stripe /100 yds	9 39	1220 70
	364 lbs	40/60 Duck Down & Feathers	2 50	910 00
	10,671 "	Raw Col.Chicken Feathers	07	746 97
	992 "	" White " "	09	89 28
	12,006 "	" " " "	07	840 42
	1661½ "	White Duck Feathers	95	1578 42
	1460 "	Raw Duck Quill	15	219 00
	536 "	Raw Duck Feathers	93	498 48
	1283 "	Raw Turkey Feathers	06	76 98

DO NOT ACCEPT THIS WAREHOUSE RECEIPT IF ANY INCORRECTNESS APPEARS HEREIN

NO LIEN FOR STORAGE, HANDLING AND OTHER CHARGES AS PER CONTRACT WITH THE NOTARY SERVED

DELIVERY OF MERCHANDISE NOT COMPLETE UNTIL ENTERED UPON THE BOOKS OF THE WAREHOUSE

LAWRENCE WAREHOUSE COMPANY

PER

BONDED WAREHOUSE MANAGER

Lawrence Warehouse Company Office Copy

RECORD OF RELEASES AND BALANCE ON HAND

ITEM 1

Delivered	Balance	Insurance Balance
	665½	665.50
271	6383	638.30
195	6188	618.80
243	5945	594.50
232	5713	571.00
221	4982	498.20

OUT

ITEM 2

Release No.	Delivered	Balance	Insurance Balance
		127	12 70
3/4	65(1)	12	

ITEM 3

Date	Release No.	Delivered	Balance	Insurance Balance
			2275	227 50
6/11	1	167	2108	210 80
6/26	2	92	2016	201 60

ITEM 4

Delivered	Balance	Insurance Balance
	13,000	1220 70
1000	10000	939.00
300	7000	657.30
700	—	—

OUT

ITEM 5

Release No.	Delivered	Balance	Insurance Balance
		364	89 60
3/14	6	358	

ITEM 6

Release No.	Delivered	Balance	Insurance Balance
		10,671	746 97
3/14	1	10,503	669 80
3/21	3(1)	9,998	639 87
4/3	2	7,956	508 92
4/16	3	3365	4/21	293 37
4/25	4	3190	222 30
5/5	5	3190	—	—

ITEMS 7 8 9 10 11 AND 12 ON REVERSE SIDE OF THIS SHEET

72462

RECORD OF RELEASES AND BALANCE ON HAND

ITEM 7				ITEM 8				ITEM 9			
Release No	Delivered	Balance	Insurance Balance	Date	Release No	Delivered	Balance	Insurance Balance	Date	Release No	Delivered	Balance	Insurance Balance
		992	80 00				12008	600 56				16618	830 90
20	295	697	62 73	5/26	79	2983	9025	631 75	7/21	20174	482	11274½	1127 50
22	697	0	0	6/2	82	4015	5010	350 70	8/26	71	500	6774½	677 45
				6/27	10	5200	0		9/2	22	6774½	0	0

ITEM 10				ITEM 11				ITEM 12			
Release No	Delivered	Balance	Insurance Balance	Date	Release No	Delivered	Balance	Insurance Balance	Date	Release No	Delivered	Balance	Insurance Balance
		1460	219 00				838	125 70				1298	
142	1460	0	0	2/14	65	838	0	0	7/5	67	1298	0	0

The face hereof is a copy of original Non-Negotiable Warehouse Receipt bearing the same number and date hereof. This copy is for purposes of certification and record only and is not a Warehouse Receipt. Any references on this copy to the face of such original Non-Negotiable Warehouse Receipt or the face of the copy includes only that portion of the original Non-Negotiable Warehouse Receipt the words "Lawrence Warehouse Company Office Copy" set forth on the face hereof.

. . . . . .

I (We) the undersigned certify and guarantee that the face hereof is a true copy of the face of the Lawrence Warehouse Company original Non-Negotiable Warehouse Receipt bearing the same number and date hereof and this copy has been compared by us with the original

I (we) the undersigned hereby certify and guarantee that I (we) am the legal owners of the commodities set forth on the face hereof and that the quantity and quality stated thereon are correct and that I (we) have delivered the same as of the date hereof to the Lawrence Warehouse Company for warehousing purposes in accordance with the terms of our storage agreement with them. I (we) hereby authorize the Lawrence Warehouse Company to issue a Non-Negotiable Warehouse Receipt bearing the same number and date hereof covering the above mentioned commodities in the name of

California Bank at Bell, Calif.

Depositor C. A. Reed Furniture Company

By [signature]

. . . . . .

I the undersigned certify and guarantee that the face hereof is a true copy of the face of the Lawrence Warehouse Company original Non-Negotiable Warehouse Receipt bearing the same number and date hereof and this copy has been compared by me with the original

I hereby certify that I received on Feb. 27 47 into my custody as

Bonded Warehouse Manager of the Lawrence Warehouse Company at its

Los Angeles Warehouse No. 185

the commodities set forth on the face hereof and have stored as original Non Negotiable Warehouse Receipt covering the above mentioned commodities. Such original Non Negotiable Warehouse Receipt was issued and signed by me and such commodities will be released by me from the above mentioned warehouse only in accordance with Lawrence Warehouse Company written instructions which I have heretofore received or may hereafter receive. I realize that to issue or sign such original Warehouse Receipt and the copies thereof or to release such commodities otherwise than in accordance with such written instructions violates the terms of my employment by the Lawrence Warehouse Company and constitutes a fraud upon that Company and the holders of its Warehouse Receipts.

Lawrence Warehouse Company Bonded Warehouse Manager [signature]

. . . . . .

INSTRUCTIONS TO LAWRENCE WAREHOUSE COMPANY BONDED WAREHOUSE MANAGER

IMPORTANT. The Lawrence Warehouse Company Bonded Warehouse Manager making out and signing the original Non-Negotiable Warehouse Receipt bearing the same number and date hereof must forward the signed copy of such Warehouse Receipt ON THE DATE HEREOF to the Lawrence Warehouse Company office the address of which is inscribed on its written instructions addressed to such Bonded Warehouse Manager.

RECEIVED
LAWRENCE WAREHOUSE CO.
LOS ANGELES, CALIF.
MAR- 1 1947
A.M. 7|8|9|10|11|12|1|2|3|4|5|6 P.M.

OUT

OUT

OUT

OUT

INSURED under terms and conditions as stated on original of this Warehouse Receipt

SEE ... FOR ...

EXHIBIT "B"

LAWRENCE WAREHOUSE RECEIPTS AS PLEDGED TO CALIFORNIA BANK

as of 6-24-47

Receipt No.	Item No.	No. of Units	Contents
W 61090	3	350½ lbs	Quill Stock
W 61091	2	192 pcs	India Webbing
W 61092	4	1,767 lbs	Col. Chicken Quills
W 61092	5	1,635 bls	White Chicken Quills
W 61092	8	274 each	H-2 Hassocks
W 63028	7	78 each	Comforters, Balloon Cloth, cut not sewed
W 63028	8	56 each	Comforters, Rose Dust Balloon Cloth, sewed
W 69670	2	105 lbs	Raw Duck Quill
W 70009	1	91 lbs	50/50 Down & Feathers
W 70017	10	161 lbs	Raw white duck quill
W 70062	2	200 lbs	Sisal Pad
W 70064	6	480 lbs	Unpolished Hemp Twine
W 70069	2	3 each	R1401 Chair Quilt Rose Satin
W 70069	3	4 each	R1401 Chair Quilt Blue Satin
W. 71303	2	578 lbs	Raw Duck Quill
W 71310	1	8890 lbs	Assorted Special Upholstery springs
W 71325	1	523 yds	LaVergne Rose Ticking 56" Fabric
W 71643	1	368 lbs	17 sacks #28 processed down & Feathers
W 71646	2	1612 lbs	44 bags #28 processed Down & Feathers
W 72454	1	1084 lbs	#28 Stock processed Down & Feathers
W 72458	2	577 yds	56" ACA Type Sateen ticking fabric
W 72461	9	492-4 yds	Gabardine—White
W 72461	10	2638 yds	#900 3" Webbing—2 stripe
W 72461	11	5286 yds	3-3/4" Webbing
W 72461	12	1766 yds	2-3/4" Webbing [20]

Receipt No.	Item No.	No. of Units	Contents
W 72462	1	4982 lbs	#5 Springs
W 72462	3	2016 lbs #8	#8 Springs
W 72462	10	1460 lbs	Raw Duck Quill
W 72463	2	2848 lbs	Chinese Goose Down & Feathers
W 72463	3	10,068 lbs	Chinese Duck Down & Feathers
W 72463	4	335 lbs	50/50 Duck Down & Feathers
W 72463	5	1012 lbs	Duck Down & Feathers #35 Stock
W 72463	7	10,654 lbs	India Staple Cotton
W 72465	1	1 each	Chair in T 19855 Cerise, #R1217A
W 72465	5	6 each	R74 Chair in Remnants
W 72465	7	1 each	R 805A Chair in T1 7187 Turq. Plush
W 72465	9	1 each	J 506A Chair in 7816 Blue 107
W 72466	4	1 each	R 299A Chair in S6 Rose
W 72466	5	2 each	R 67 Chairs in H3 2678 Blue
W 72466	6	1 each	R 1057A Chair in Q1 3832 Raspberry
W 72466	7	1 each	R 3305½ Chair in C8 58 BK 190-472
W 72466	10	2 each	J 519A Chair in Muslin
W 72466	11	1 each	J 501A Chair in W4 Fenton 14-3A Blue
W 72466	12	1 each	J 519A Chair in Muslin
W 72467	1	1 each	R 822A Chair in C1 Coral Bea Rose
W 72467	2	10 each	R 103 Chair in Remnants
W 72467	20	1 each	R 370A Sofa in I. S. R1 3151 Blue, O. S. S2 Ace Lt. Bl.
W 72467	11	1 each	R 370A Chair in I. S. R1 3151 Blue O. S. S2 Ace Lt. Bl.
W 72467	12	1 each	R 1115B in Quilt. Caliglo Terra
W 72468	3	1 each	R 401A Chair in W1 866 Rose Mohair
W 72468	4	1 each	R 45A Chair in M1 13789-305 Blue
W 72468	5	1 each	R 1115 BX Chair in C1 582-317 Green Plaid
W 72468	6	1 each	R 410A Sofa in W1 866 Rose Mohair [21]

Receipt No.	Item No.	No. of Units	Contents
W 72468	7	1 each	R 410A Sofa in W4 Fenton 14-3A Rose
W 72468	8	1 each	R 370A Love Seat in I. S. L3P2090 O. S. A3 2007 Green
W 72468	9	1 each	R 410A Chair in W4 Fenton 14-3a Rose
W 72468	10	1 each	R 370A Sofa in P & A Plum Cretone
W 72468	11	1 each	R 1057K Chair in B4 4415 Green
W 72468	12	1 each	R 1055A Sofa in 6446-2 Green Chintz
W 72469	1	1 each	R 410A Sofa in W1 866 Blue Mohair
W 72469	2	1 each	R 410A Chair in " " " "
W 72469	3	2 each	R 495A Center Sec. in Frenso Crash
W 72469	4	2 each	R 495A End Sec. In " "
W 72469	5	1 each	J513A Sofa in 46014 Rose Beige
W 72471	5	1174 yds	Printed Muslin-Flowered
W 72472	2	81 yds	Caliglo Quilted Terro Cotta Fabric
W 72473	1	21 yds	A3 2678 Wine Stripe damask fabric
	2	182-5 yds	A3 4265 G & A Green Mohair "
	3	13 yds	A3 2007 Velour Emerald Green fabric
	4	7 yds	A3 2678 Blue Stripe Damask "
	5	18 yds	A3 4266 Floral White Fabric
	6	142-1 yds	A3 4267 Wool Lime Fabric
W 72474	1	96 yds	A4 1101 Beige Fabric
	2	48-3 yds	A4 1101 Color 4 "
	4	31-3 yds	A4 1110 Natural "
	6	16 yds	A4 1108 Tapestry "
	7	707 yds	A4 1499 Blue "
W 72475	1	93-5 yds	B2 7588/4 Green Linen Fabric
	2	40-5 yds	B2 7588/12 Beige " "
	3	126 yds	B2 7588/72 Beige " "
	4	109-6	B2 7588/9 Yellow " " [22]

Receipt No.	Item No.	No. of Units	Contents
W 72475	6	25-4 yds	B2 9333-9 Yellow Linen Fabric
W 72926	1	195-2 yds	Worchester 443-1 B2 Fabric
	2	98-1 yds	" 443-5 " "
	3	38-7 yds	" 443-7 " "
	4	8-2 yds	" 443-9 " "
	5	136-7 yds	" 562 " "
	6	37-4 yds	" 564 " "
W 72927	1	80-4 yds	Worchester 568 B2 Fabric
	2	106-7 yds	" 943 " "
	3	201-6 yds	" 967-1 B2 Fabric
	4	105-4 yds	" 967-5 " "
	5	179-1 yds	" 967-42 " "
	6	20 yds	" 976-1 " "
W 72928	1	41-4 yds	" 1025 " "
	2	23 yds	" 1008 " "
	3	109-3 yds	" 1094/92 B2 Fabric
	4	168-5 yds	" 1277/7 " "
	5	96-1 yds	" 1277/4 " "
	6	95-2 yds	" 1277/72 " "
W 72929	1	39 yds	" 1383 " "
	2	60 yds	" 1386 " "
	3	30-4 yds	Linen 9333/9 " "
	4	12 yds	Nublin-Natural " "
	5	71 yds	Nubflex 7943/12 " "
	6	15 yds	B5110 " "
W 72930	1	18 yds	B3 13881-29 Red Fabric
	2	39 yds	B3 13881-13 " "
	3	39-2 yds	B4 469 Blue Fabric [23]

Receipt No.	Item No.	No. of Units	Contents
W 72930	4	39-4 yds	B4 469 Rose Fabric
	6	38-3 yds	B4 469 Turq. Fabric
W 72931	1	82 yds	B4124 4613 Blue Fabric
	2	83-4 yds	B4122 Coral "
	3	207-4 yds	B4102 Rose "
	4	78-4 yds	B4123 Olive "
	5	28 yds	B4103 Green "
	6	15-3 yds	B4 4415 Green "
W 72932	1	26 yds	B4121 Tur. Fabric
	2	173-6 yds	B4101 "
	3	55-6 yds	B5 426A Blue 531 Fabric
	4	50-7 yds	B5 Matelasse Wine "
	5	50-6 yds	B5 Andover Blue "
	6	56-5 yds	B6 5110 C2 Beige "
W 72933	1	48-6 yds	B6 A2 5140 Beige Fabric
	2	15 yds	B 5132 A1 Wine Tap "
	3	15 yds	B 5161 433 Rose 908 "
	4	64-5 yds	B 5100 C1 Beige "
	5	64-4 yds	B5121 Rose Ratine Tap C3 Fabric
	6	76-5 yds	C1 2720 Col 1237 Fabric
W 72934	1	79-5 yds	453 Col 227 Red Fabric C1
	2	17 yds	4664 Col 2219 Rose " "
	3	83 yds	5508 " 203 Lt. Blue Fabric C1
	4	91 yds	Essex Venetian Blue Fabric C1
	5	78 yds	5508 Col 207 Green " "
	6	103-5 yds	582 " 227 Red Check " "
W 72935	1	84-4 yds	C1 582 Col 203 Plaid Fabric
	2	48-2 yds	C1 5508 Col 212 Gold " [24]

Receipt No.	Item No.	No. of Units	Contents
W 72935	3	118	C1 Coral Sea 2219 Rose Prt Fabric
	4	119	C1 Coral Sea 2201 Beige "
	5	33-4	C1 1151 Col 207 Green "
	78-4		C1 5508 Col 270 Grey "
W 72937	1	63-3 yds	C1 2720 Col 238 Geranium "
	2	57 yds	C1 453 Col 317 "
	3	80-6 yds	C1 453 Col 203 Blue "
	4	35-2 yds	C1 1699-4 2286-20 216 Blue "
	5	49-4 yds	C1 582 Col 240 Rose Plaid "
W 72938	1	59 yds	C1 1152 Col 712 Lime "
	2	125-7 yds	C1 2720/4 Col 219 Rose "
	3	64-1 yds	C1 1152 Col 203 Blue & Silver "
	4	29 yds	C1 Georgian Scroll Col 207 "
	5	325 yds	C1 " " " 201 Beige Fabric
	6	44 yds	C1 " " " 227 Red "
W 72939	1	49 yds	C1 582 Col 317 Green Plaid Fabric
	2	152-7 yds	C1 2720/5 Col 1270 Fabric
	3	21 yds	C1 2720/1 Col 227 Red "
	4	33-6 yds	C1 1120 Col 209 Rose "
	5	96-2 yds	C1 5508 Col 209 Rose "
	6	102-1 yds	C1114 Lime "
W 72940	1	111-2 yds	C1105 French Blue "
	2	83-7 yds	C1120 5511/221 Beige "
	3	40 yds	C1 Essex Citron Green "
	4	62 yds	C1111 Col 240 Rose "
	5	50-7 yds	C1 5508 Col 2020 Gold "
	6	148 yds	C11 91 Green "
W 72941	1	146 yds	C11 91 Red Fabric [25]

Receipt No.	Item No.	No. of Units	Contents
W 72941	2	50 yds	C11 91 Rose Fabric
	3	44 yds	C2 200 Green "
	4	169 yds	C2 200 American Beauty Quilted Fabric
	5	14 yds	C4 4004 Print
W 72942	1	27 yds	C6 Colorcade Shenandoah Fabric
	2	35-2 yds	C6 " Alamo Tan "
	3	18-4 yds	C6 " Sun Valley "
	4	40-3 yds	C6 " Grand Canyon "
	5	36-5 yds	C6 Glencade Sun Valley "
	6	18-2 yds	C6 Alamo Tan Fabric
	7	31-2 yds	C6 Glencade Great Lakes "
	8	36-1 yds	C7 6934/1 Grey Brocade "
W 72943	1	8-5 yds	C7 10067 Turq. Fabric
	2	15 yds	C8 #87 Cocoa "
	3	38 yds	C8 87 Chart "
	4	55-4 yds	C8 87 Blue "
	5	37 yds	C8 87 Red "
	6	13 yds	58K109 Green & Brown Fabric
W 72944	2	18 yds	C8 58 Hi34 Paltinum & Rose Fabric
	3	43 yds	C8 58 BK190 494 Rose & Grey "
	4	23-6 yds	C8 85AH 135 Col 470 Fabric
	5	12-5 yds	C8 58K141 Col 424 "
	6	41-6 yds	C8 58K190 Col 472 Blue & Beige Fabric
W 72945	1	251-4 yds	D1 Santos Lemon Fabric
	2	106-6 yds	D1 Santos Lacquer Fabric
	3	35-1 yds	D1 " Blue "
	4	29-1 yds	D2 9053 Ivory "
	5	20-1 yds	D2 9051 Print Col 5 " [26]

Receipt No.	Item No.	No. of Units	Contents
W 72945	6	15-3 yds	D-2 9050 Col 1 Fabric
W 72946	1	7-4 yds	D2 9032 Col 3 Fabric
	2	10-5 yds	D3 Cotton Stripe Red, Turq, White Fabric
	3	19 yds	D3 548 Stripe Red, Blue Beige "
	4	15-4 yds	D3 549 " " Green " "
	5	71 yds	E1 Clivedon Rose Fabric
	6	20 yds	E1 Clivedon Wine "
W 72947	1	26-4 yds	E1 Faille Turq. Fabric
	2	14-1 yds	E1 Plymouth White "
	3	37 yds	E1 Fenway Blue "
	4	7-1 yds	E1 Jacobean Peach "
	5	47-7 yds	E1 Fenway Wine "
	6	53-3 yds	E1 Jacobean Wine "
W 72948	1	15-5 yds	F1 1765 Lt Green "
	2	32-6 yds	F1 5723 Tan Print "
	3	16-3 yds	F1 7243 Green "
	4	16-4 yds	G1 Arakan Coral Rose Fabric
	5	428 yds	G2 Plain Victorian Beige "
	6	53 yds	G2 Vestal Rose 1339 Fabric
W 72949	1	24-2 yds	G2 3600 Rose & Green Stripe Fabric
	2	49-5 yds	G2 3600 Blue & Rose Fabric
	3	33 yds	G2 3600 " Rose Bouquet #7
	4	133-5 yds	G2 3600/1 Wine & Blue Stripe Fabric
	5	68 yds	G2 Woodland Fern Nat Fabric
	6	73-5 yds	G2 Cascade Burnt Orange Fabric
W 72950	1	10 yds	Cascade Chartreuse G2 Fabric
	2	356-4 yds	Dahlia Natural G2 Fabric
	3	9 yds	Victory Bouquet Natural Fabric
	4	9-6 yds	Georgian Wine G2 Fabric [27]

Receipt No.	Item No.	No. of Units	Contents
W 72950	5	12-4 yds	3026 Blue Stripe G2 Fabric
	6	29-4 yds	1040 Ramsey Turq. G2 "
W 72951	1	210 yds	Plain Victorian Rose G2 Fabric
	2	216 yds	" " Plum " "
	3	480 yds	" " Blue " "
	4	39 yds	Quilt Chintz Tan G3 "
	5	31-6 yds	" " Blue " "
	6	63-2 yds	Brown Check " "
W 72952	1	13 yds	G3 Rhododendron Rose "
	2	8 yds	G3 Orwell Blue
	3	37-2 yds	G3 Turq. Bouquet Print "
	4	51 yds	G3 Rhododendron Tan "
	5	90-1 yds	G3 Rosedale Blue "
	6	40 yds	G3 Rhododendron Turq. "
	7	105 yds	G3 2822 Finlay Blue "
W 72953	1	99 yds	G3 2822 Finlay Rose "
	2	155-2 yds	" Cola hand Print-Blue "
	3	91-2 yds	" " " " Rose "
	4	22 yds	" " " " Gold "
	5	44-3 yds	" " " " Tan "
	6	47 yds	" " " " Green "
W 72954	1	64-4 yds	G3 Tan Bouquet Print "
	2	48-4 yds	G3 5200 Yellow Print "
	3	88-4 yds	G3 Rosedale Rose "
	4	24-2 yds	G3 Rhododendron Yellow "
	5	47 yds	G3 1425 Rust "
	6	12-7	G3 1232 Wine & Grey Stripe "
W 72955	1	54-2 yds	G3 Wanderer Red "
	2	30-4 yds	G3 Green Chintz "

Receipt No.	Item No.	No. of Units	Contents
W 72955	3	50 yds	G3 Rhododendron Blue Fabric
	4	18 yds	G3 Orwell Raspberry "
	5	55 yds	G4 #900 Modern Roughtex Rose "
	6	19 yds	G4 Garwood Rose, Canary, Ivory Fabric
W 72956	1	28 yds	Jacobean Plat. Rose, Ivory Fabric
	2	10-4 yds	Victorian 601 Plat. Green, Rose Fabric
	3	8-4 yds	#900 Modern Roughtex Mauve "
	4	48-4 yds	Concert #2 Blue Fabric
	5	106-2 yds	" #1 Red "
	6	46 yds	Victory Satin Putty 6858 "
W 72957	1	132 yds	Victory Satin G6 Fabric Stop Red
	2	181-6 yds	" " " Turq. Fabric
	3	216-6 yds	90/6864 Chartreuse Fabric G6
	4	110-5 yds	Mandarin Woodrose Fabric G6
	5	202-1 yds	Artura Bermuda Coral Fabric G6
	6	667-6 yds	Ascot Spruce Green Fabric G6 and Manchu Red
W 72958	1	521-5 yds	Ascot Cordova Tan Fabric G6
	2	270-5 yds	" Kelly Green " "
	3	23-2 yds	Madarin Melon " "
	4	12-3 yds	Artura Atoll Blue " "
	5	54-6 yds	906872 Turq. " "
	6	209-1 yds	Ascot Brostol Blue " "
W 72959	1	202-4 yds	Ascot Turq. " "
	2	289-1 yds	Ascot Manchu Rose " "
	3	15 yds	Grospoint Madiera Wine " "
	4	13 yds	H1 1500 Gold "
	5	62-8 yds	H1 1500/4 Red "

Receipt No.	Item No.	No. of Units	Contents	
V 72960	2	8 yds	1439/28 Dusty Rose H1	Fabric
	3	45 yds	1439-34 Blue "	"
	4	81-4 yds	H2 Radiance Rose	"
	5	50 yds	H2 Radiance Yellow	"
	6	20 yds	H2 Radiance Blue	"
V 72961	1	14 yds	Oran White H2	"
	2	69 yds	Hollywood Maize H2	"
	3	97 yds	" Grey "	"
	4	92 yds	Revere Rose "	"
	5	79½ yds	Revere Pistachio "	"
	6	158 yds	Revere Chartreuse "	"
V 72962	1	182-2 yds	H2 Crewel Beige Fabric	"
	2	167 yds.	H2 Revere Burgundy	"
	3	35 yds.	H2 Crewel Gold	"
	4	83 yds.	H2 #1000 Eggshell	"
	5	11 yds.	H2 Radiance Ivory	"
	6	70 yds.	H2 Radiance Green	"
V 72963	1	9-7 yds.	Oran Beige H2	"
	2	35 yds.	H3 Foster 7491 Chart.	"
	3	24-4 yds.	H3 Foster 7160 Turq.	"
	4	16 yds.	H3 Garden Gold	"
	5	30 yds.	H3 Garden Blue	"
	6	40-6 yds.	H3 Farragut 7692 Yellow	"
V 72964	1	12 yds	Foster 7398 H3	"
	2	68-3 yds.	H3 Foster 7694 Lt. Green	"
	3	16 yds.	H3 Dunkirk Chart	"
	4	7-1 yds.	H3 Floral Bouquet Tan	"
	5	23 yds.	H3 Floral Bouquet Rose	"
	6	30 yds.	H3 Farragut 7693 Coral	"

Receipt No.	Item No.	No. of Units	Contents
W 72965	1	7 yds.	Farragut 7662 Turq. H3 Fabric
	2	65-5 yds.	Foster 7250 Yellow " "
	3	42-4 yds.	Foster 7498 Wine " "
	4	1227-7 yds.	Eng. Bouquet Col 25 H4 "
	5	35-8 yds.	Guam Green H4 "
	6	255 yds.	Trop. Isle 9706 H4 "
W 72966	1	94-6 yds.	H4 Tropical Isle 9705 Lt. Green Fabric
	2	204-4 yds.	" Tropical Isle 9703 Blue "
	3	55 yds.	" 4803 Eggshell "
	4	1101-6 yds.	" Eng. Bouquet Col 23 "
	5	139-2 yds.	" Tropical Isle 9704 Beige "
	6	125 yds.	" Tropical Isle 9711 Green Dk. "
W 72967	1	474-6 yds.	Eng. Bouquet Col 26 H4 "
	2	402-1 yds.	Eng. Bouquet Col 27 " "
	3	94-5 yds.	Guam Red " "
	4	16 yds.	H5 1263 Needle Point Tap. Turq. "
	5	82 yds.	H5 Blue & Gold Stripe Montarey "
	6	11 yds.	H6 Poppy Hand Print Red & Green "
W 72969	1	36-4 yds.	H6 Poppy Hand Print Tan & Red "
	2	90-4 yds.	K1 Garden Natural "
	3	19 yds.	K1 Garden Blue "
	4	53-4 yds.	K1 Garden Maize "
	5	58 yds.	K1 Garden Rose "
	6	16 yds.	K1 Garden Turq. "
W 72970	1	41 yds.	Cardinal Raspberry K1 "
	2	13 yds.	Cardinal Green " "
	3	36 yds.	Cardinal Turq. " "
	4	50 yds.	Cardinal Rose " " [31

Receipt No.	Item No.	No. of Units	Contents	
V 72970	5	39-1 yds.	Kenvil Spec. Green 21437 K1	Fabric
	6	76-5 yds.	Kenvil Turq. "	"
V 72971	1	83-4 yds.	Kenvil Raspberry	"
	2	15 yds.	Greeley Truquoise	"
	3	203-0 yds.	Greeley Green	"
	4	155 yds.	Greeley Gold	"
	5	140 yds.	Greeley Rose	"
	6	89 yds.	Lattice Rose	"
V 72972	1	12 yds.	Lattice Gold	"
	2	53-2 yds.	Kenvil Rose	"
	3	11 yds.	Kenloom 5228 Grey	"
	4	129-6 yds.	Indian Summer Tan	"
	5	8-6 yds.	K-2 Grey and Wine	"
	6	25-5 yds.	Crestwood Maize	"
	7	58-4 yds.	Crestwood White	"
V 72973	1	53 yds.	K-2 3500 Blue Print	"
	2	47-2 yds.	" 4122 Rose Print	"
	3	35-6 yds.	" Astra Grey	"
	4	33-1 yds.	" Radiance Blue	"
	5	11-4 yds.	" Radiance Ivory	"
	6	58 yds.	" Modern Blue Print	"
V 72975	1	63 yds.	K-3 4161 Stripe	"
	2	16 yds.	" 4272 Wine Stripe	"
	3	25-4 yds.	" 4161 Blue and Gold Stripe	"
	4			
	5	43-2 yds.	K-4 2179-22627-4143 Blue	"
	6	35-2 yds.	" 2198-20474-4143 Rose	"

[32]

Receipt No.	Item No.	No. of Units	Contents	
W 72976	1	79-1 yds.	K-4 11020-4143 Chartreuse	Fabric
	2	36 yds.	" 2057-29934-4143 Rose	"
	3	43-4 yds.	" Kelley Green	"
	4	34 yds.	" 5403	"
	5	42 yds.	" 4143 Kelley Green	"
	6	98-3 yds.	L-1 5403 Blue	"
W 72977	1	75-2 yds.	L-1 420 Rose	"
	2	106-2 yds.	L-3 P 2090 White Print	
	3	56 yds.	L-3 P 2090 Yellow Print	
	4			
	5	7 yds.	M-1 13779 Col 10 Tuscan Red	"
	6	22 yds.	M-1 13789 Col 455 Chartreuse	"
W 72978	1	19 yds.	M-1 13883 Col 305 Blue	"
	2	14-4 yds.	M-1 13779 Col 27	"
	3	8 yds.	M-1 13789 Col 305 Blue	"
	4	41 yds.	M-1 13792 Col 50 White	"
	5	20 yds.	13779 Col 45 Gold	"
	6	9 yds.	M-2 5631 Rose	"
W 72979	1	16-2 yds.	M-3 E711/281 Green	"
	2	5 yds.	M-3 38200/511 Ash Rose	"
	3	36-4 yds.	M-3 38200/517 Ash Rose	"
	4	40-3 yds.	M-3 T93/231 Chartreuse	"
	5	9-1 yds.	M-3 T93/511 Foam Green	"
	6	20-6 yds.	M-3 T93/511 Ash Rose	"
W 72980	1	26 yds.	M-3 T93/981 Platinum	"
	2	27 yds.	" 605/72 Silver	"
	3	7-7 yds.	T93/821 Fabric M-3	
	5	25-2 yds.	581/RC981 Platinum M-3	"
	6	7 yds.	M-3 3596/71 Silver	" [3

Receipt No.	Item No.	No. of Units	Contents
V 72981	1	113-5 yds.	M-3 T93/811 Cerise Fabric
	2	9-2 yds.	" 687/76 Silver Blue "
	3	4 yds.	" E698/222 Sky Blue "
	4	11-4 yds.	T93/221 M-3 Sky Blue "
	6	17-2 yds.	M-3 581/223 Blue Ratine "
V 72982	1	11-7 yds.	M-3 3572 52400/IB64 Champagne Fabric
	2	11-6 yds.	M-3 566/511 Rose "
	3	6 yds.	E699/71 Silver " "
	4	10 yds.	M-3 M3100 Silver "
	5	168-2 yds.	M-6 P2014 Beige "
	6	24 yds.	M-6 P2014 Grey "
V 72983	1	10-5 yds.	N-1 7346 Col 7 Blue "
	2	151½ yds.	P-1 Lennox Rose and Green "
	3	76-6 yds.	Barbizon Rose P-1 "
V 72984	1	14 yds.	N-1 1101 Col 7 Blue "
	2	36 yds.	N-1 7816 Col 107 Blue "
	3	9 yds.	N-2 L20002 Rose "
	4	141-6 yds.	P-1 Barbizon Ivory "
V 72985	1	8 yds.	P2 Chatham Green "
	2	151 yds.	P2 Baltic Rose- "
	3	62 yds.	Baltic Powder Blue P2 "
	4	9504 yds.	P2 Baltic Chartreuse "
	5	82-4 yds.	Q-1 3832 Raspberry "
	6	98-2 yds.	Q-1 3832 Col 607 Chartreuse "
V 72986	1	404 yds.	R-1 775 Richtex Wine "
	2	162-5 yds.	R-1 775 Richtex Rose "
	3	594-7 yds.	R-1 775 Richtex Turquoise "
	4	18 yds.	R-1 3151 White "
	5	13-5 yds.	R-1 3139 White " [34]

Receipt No.	Item No.	No. of Units	Contents	
W 72987	1	97-1 yds.	R-3 51800 Eggshell	Fabric
	2	37 yds.	S-1 Mayhew Wine	"
	3	235-7 yds.	S-2 Raytex Green	"
	4	381 yds.	S-2 Raytex Gold	"
	5	74-3 yds.	S-2 Tan 3235	"
	6	1515-6 yds.	S-2 Raytex Tan	"
W 72989	1	721 yds.	Light Blue Muslin	
	2	195 yds.	Dark Blue Muslin	
	3	56-1 yds.	Caltex Rose	"
	4	166 yds.	Quilted Satin Blue	"
	5	111 yds.	Quilted Satin Rose	" [35]

EXHIBIT "C"

WAREHOUSE RECEIPTS

Releases 5-L – 8-L

Warehouse Receipt No.	Item No.	Units	Size	Description
Release No. 5-L)				
72933	6	16	Yds	C-1 2720-1237 Green
72945	4	9-5	"	D-2 9053-97
72971	4	½	"	K-1 Greeley Gold
72977	3	8-4	"	L-3 P2090 Yellow Print
72942	1	13	"	C-6 Colorcade Shenandoah
72943	6	4-4	"	C-8 58K 109 Green & Brn.
72982	6	24	"	M-6 2014 Grey
72944	3	15	"	C-8 58K190-494 Rose/Grey
72473	1	4-4	"	A-3 2679 Wine
72948	6	4-6	"	G-2 Vestal Rose
72950	2	24-4	"	G-2 Dahlia Natural
72982	4	3	"	M-3 3100 Silver
72474	4	10-4	"	A-4 1110 Natural
72961	5	5-4	"	H-2 Revere Pistachio
72966	5	20	"	H-4 Tropical Isles Beige
72979	3	2	"	M-3 38200-517 Ash Rose
72949	1	17-2	"	G-2 3600-1 Rose & Green
72938	5	1	"	C-1 Georgian Scroll Beige
72463	7	1960	Lbs	India Staple Cotton
70009	1	91	"	50/50 Down & Feathers
72965	1	7	yds	H-3 7662 Turq
72950	1	10	"	G-2 Cascade Chart.
72937	3	6-2	"	C-1 453-203 Blue

Warehouse Receipt No.	Item No.	Units	Size	Description
Release No. 5-L Sheet No. 2				
72983	2	20	yds	R-1 Lennox Rose & Green
72939	2	11-4	"	C-1 2720-1270 Grey
72987	1	14-3	"	R-3 51800 Eggshell
72966	6	15	"	H-4 Trop. Isles Dk Green
72977	5	1-4	"	M-1 13799-10 Red
72463	4	335	lbs	50/50 Duck & Down & Feathers
61091	2	24	"	India Webbing
70064	6	170	"	Unpolished Hemp Twine
Release No. 6-L				
72966	5	37	yds	K-4 Trop. Isles Beige
72471	5	85	"	Printed Muslin
72987	6	29-4	"	S-2 Raytex Tan
70069	2	3	ea	R1401 Chair Quilt Rose
70069	3	4	"	" " " Blue
72466	4	1	"	R299A " in S-6 Rose
72466	8	1	"	R1057A " in C-8 58K190
70064	6	310	lbs	Unpolished Hemp Twine
Released No 6-L Sheet No. 2				
72463	2	190	lbs	China Goose D/F
72463	5	71	lbs	Duck D/F #35 Stock
72462	1	731	lbs	#5 Springs
72462	3	92	lbs	#8 Springs
69928	8	4	yds	M-1 13763 Blue
72949	1	14	yds	G-2 3600/1 Rose & Green
Release No. 7-L				
72955	3	1-6	yds	G-3 Rhododendron Blue
72985	3	1	"	P-2 Baltic
72987	1	82-6	"	R-3 51800 Eggshell
72966	6	5	"	H-4 Trop. Isles Dk Green
72944	6	5-4	"	C-8 58BK 190-472
72933	4	6	"	B-5100 C-1 Beige Tap. [36]

Warehouse Receipt No.	Item No.	Units	Size	Description
(Release No. 7-L Con't.)				
72961	1	10-4	yds	H-2 Oran White
72941	1	12	"	C-1191 Red
72938	5	2	"	C-1 Georg. Scroll Beige
72474	6	16	"	A-4 1108 Tapestry
72962	2	6	"	H-2 Revere Burgundy
72950	2	10	"	G-2 Dahlia Natural
72931	3	4-2	"	B-4102 Rose
72957	6	7	"	G-6 Ascot Spruce Green
72933	5	6-4	"	B-5121 Rose
72971	3	6-4	"	K-1 Greeley Green
72463	7	1960	Lbs	India Staple Cotton
72966	5	4	yds	H-a Trop Isles Beige
72961	5	23	"	H-2 Revere Pistachio
72972	1	7-4	"	K-1 Lattice Gold
72930	2	6-4	"	8-3 13881-13 Red
72933	6	4-4	"	C-1 2720-1237 Green
72935	2	10-4	"	C-1 5508-202 Gold
72970	2	13	"	K-1 Cardinal Green
72971	4	30	"	K-1 Greeley Gold
72959	5	5-6	"	H-1 1500-40 Red
61091	2	24	pcs	India Webbing
72929	4	12	yds	R-2 Nublin Natural
72959	5	14	"	H-1 1500-40 Red
72958	1	11	"	G-6 Ascot Cordova Tan
72960	4	12	"	H-2 Radiance Rose
72940	3	32	"	C-1 Essex Citron Green
72932	1	5-2	"	B-4121 Turq.
72931	5	5-2	"	B-4103 Green
72944	2	4-6	"	C-8 58H-134
72957	5	4-6	"	C-6 Artura Berm. Coral
72945	4	4-4	"	D-2 9053-97 Ivory
72957	1	11-4	"	G-6 Victory Red

Warehouse Receipt No.	Item No.	Units	Size	Description
Release No. 8-L				
72971	4	23	yds	K-1 Greeley Gold
72465	5	1	ea	R-74 Chair in Rem. Cover
72471	5	45	yds	Printed Muslin
72468	5	1	ea	R1115 Bx Chair 6-1 582-31778
72981	2	9-2	yds	M-3 687/76 Silver Blue
72966	5	10	yds	H-4 Trop. Isles Beige
71643	1	468	lbs	#28 Stock Down & Feathers
71646	2	364	lbs	" " " " "
72463	3	1833	lbs	Chinese DD/Feathers
71325	1	523	yds	LaVergne Rose Ticking
72467	2	1	ea	R103 Chair in Rem. Cover

[Endorsed]: Filed Nov. 19, 1947. Edmund L. Smith, Clerk. [37

[Title of District Court and Cause]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

To the plaintiff above named and to Frank C. Weller, Esq., and James A. McLaughlin, Esq., and Messrs. McLaughlin, McGinley & Hanson, his attorneys:

You and Each of You Will take Notice that on Monday, the 15th day of December, 1947, at the hour of 10 A. M., or as soon thereafter as Counsel can be heard, in the Courtroom of the United States District Court for the Southern District of California, Central Division, at the Post Office Building in the City of Los Angeles, County of Los Angeles, State of California, the defendant Lawrence [38] Warehouse Company, a corporation, through its Counsel whose names are signed hereto, will move the above entitled Court for a summary judgment against the plaintiff and in favor of the defendant Lawrence Warehouse Company in the above entitled proceeding.

Said motion will be based upon this notice, upon the affidavit of E. C. Yuille and upon the Points and Authorities filed concurrently with this notice and will be made upon the following grounds:

That said affidavit shows that on or about November 14, 1945 the C. A. Reed Furniture Company and defendant Lawrence Warehouse Company entered into a contract whereby Lawrence Warehouse Company undertook to store and warehouse certain goods and commodities for the C. A. Reed Furniture Company; that said contract provided that the storage rate to be charged C. A. Reed Furniture Company was as follows: a location charge of Two Hundred and Fifty Dollars ($250.00) per annum and a monthly charge of one-tenth of one per cent of

the value of the goods stored in the warehouse; that the warehouse receipts referred to in the complaint on file herein were issued pursuant to said contract and that said receipts refer to and incorporate the terms of said contract; that C. A. Reed Furniture Company at all times knew the storage rate charged it by Lawrence Warehouse Company.

That said Points and Authorities show that even if the requirement of section 1858(b) of the Civil Code of the State of California are not met as regards the inclusion of the storage rate upon warehouse receipts, said receipts are not void and invalid.

That by reason of the foregoing matters, this is a proper case for rendering a summary judgment under Rule 56 [39] of the Rules of Civil Procedure for the District Courts of the United States.

Dated: December 1, 1947.

W. R. WALLACE, JR.
WILLIAM R. RAY
JOSEPH MARTIN, JR.
WILLIAMSON & WALLACE

Attorneys for Defendant Lawrence Warehouse Company, a Corporation

MUSICK, BURRELL & INGEBRETSEN
By Clayton Straub
James C. Ingebretsen

Attorneys for Defendant Lawrence Warehouse Company, a Corporation [40]

Received copy of the within Notice this 1st day of Dec., 1947. McLaughlin, McGinley & Hanson, by Y. Findling, Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 1, 1947. Edmund L. Smith, Clerk. [41]

[Title of District Court and Cause]

AFFIDAVIT OF E. C. YUILLE

State of California
County of Los Angeles—ss.

E. C. Yuille, being first duly sworn, deposes and says:

That he is now, and at all times mentioned in plaintiff's complaint was an officer, to-wit, a Vice President of Lawrence Warehouse Company, one of the defendants herein, and is duly authorized to make this affidavit on its behalf;

That on or about November 14, 1945, the C. A. Reed Furniture Company and defendant Lawrence Warehouse Company entered into a contract whereby Lawrence Warehouse Company undertook to store and warehouse certain goods and commodities for the C. A. Reed Furniture Company, a copy of which said contract is annexed hereto, marked "Exhibit A" and made a part hereof; that said contract pro- [42] vided that the storage rate to be charged C. A. Reed Furniture Company was as follows: a location charge of Two Hundred and Fifty Dollars ($250.00) per annum and a monthly charge of one-tenth of one per cent of the value of the goods stored in the warehouse; that the warehouse receipts referred to in the complaint on file herein were issued pursuant to said contract and that said receipts refer to and incorporate the terms of said contract; that C. A. Reed Furniture Company at all times knew the storage rate charged it by Lawrence Warehouse Company.

E. C. YUILLE

Subscribed and sworn to before me this 29 day of November,: 1947.

(Seal) LUCY E. ENOS

Notary Public in and for the County of Los Angeles, State of California [43]

["EXHIBIT A"]

[Crest] [Crest]

LAWRENCE WAREHOUSE COMPANY

FIELD WAREHOUSE STORAGE AGREEMENT

This Agreement, made and entered into at Los Angeles, California, this 14th day of November, 1945, by and between Lawrence Warehouse Company, a California corporation, party of the first part, hereinafter called "Lawrence" and C. A. Reed Furniture Company, Inc., a Corporation, party of the second part, hereinafter called "The Depositor", in consideration of the mutual covenants and agreements hereinafter contained,

Witnesseth:

1. The depositor hereby employs Lawrence to establish and operate all field warehouses required in the depositor's business upon the following terms and conditions:

2. The depositor agrees to lease, or cause to be leased, to Lawrence, upon its form of Field Warehouse Lease, adequate warehouse storage space for all commodities to be warehoused so located and constructed as to secure the proper storing and safety of commodities to be warehoused.

3. The depositor agrees to pay to Lawrence for conducting such field warehouse or warehouses, and for storing commodities therein, the following:

Storage Charges:

Furniture Manufacturing Materials:

One tenth of one percent (1/10 of 1%) of value of commodities stored per calendar month or fraction thereof. The second party agrees to report to the first party the values of commodities for which warehouse receipts are issued.

Location Charge:

$250.00 per year to cover the cost of Fidelity bonds on warehouse employees, regular examinations, supplies, etc., payable upon the issuance of the first warehouse receipt or other evidence of deposit and annually thereafter.

Premiums for insurance on commodities represented by outstanding insured warehouse receipts as provided in the "Insurance Agreement" signed by the depositor and Lawrence.

The storage charges above set forth are subject to an annual minimum payment of ~~Five Hundred~~ Two Hundred Fifty Dollars ($250.00) ~~($500.00)~~ payable on the date of this agreement and annually thereafter on the same day of each succeeding year during the term of this agreement. Storage charges accruing in excess of minimum payable on or before ten (10) days after date of invoice.

The actual cost incurred by Lawrence for all employees required by Lawrence in the conduct of said warehouse

or warehouses, and in the storing and handling of commodities therein, plus ten percent (10%), payable on or before ten (10) days after date of invoice, such ten percent (10%) to be deducted if all invoices are paid when due.

All license fees, taxes or charges levied or imposed by Federal, State, County or Municipal Governments or governmental agencies upon the operation of said warehouses, payable upon presentation of invoice.

$ At Cost for installation, preparation of documents, etc., non-recurring, payable in advance.

~~Bonds covering employees: Warehouse Manager, $25.00 per quarter; Assistant Warehouse Manager and Watchman, $6.25 per quarter each, payable annually in advance.~~

Regular warehouse examinations, $ - - - - - - - - annually, payable in advance.

Special examinations at cost, payable upon presentation of invoice.

All expenses including attorneys' fees incurred by Lawrence incident to conducting any warehouse under this agreement, maintaining possession of the warehoused commodities for the benefit of warehouse receipt holders and the depositor, and in connection with any litigation in which Lawrence or the depositor is a party, payable upon presentation of invoice. [44]

4. Lawrence hereby accepts the employment on the terms hereinbefore set forth, and agrees to extend to the depositor the full benefit of its facilities and experience as a field warehouseman.

5. It is mutually agreed that in the event no warehouse receipts are outstanding at the beginning of or issued during any contract year, and field warehouse storage is not required during such contract year, the obligation of the depositor to pay the minimum storage charges hereinbefore provided for, shall be suspended, and thereafter the term of this agreement shall be extended one year for each year of such suspension. Contract year as used herein shall mean the twelve (12) successive months immediately following the date of this agreement, and each successive twelve (12) month period.

6. It is mutually agreed that all commodities of like description stored pursuant to this agreement may each be warehoused as one general lot of fungible goods, and that the holder of a warehouse receipt shall be entitled to such portion of each such general lot as the amount of each commodity represented by such receipt bears to the whole of such general lot of such commodity.

7. This agreement shall continue in full force and effect for three (3) years from the date hereof, and thereafter for successive three (3) year terms unless either party gives to the other written notice of intention to terminate at least ninety (90) days prior to the expiration of the then current three (3) year term, provided, that no such notice of intention to terminate given by the depositor shall become effective unless all warehouse receipts, or other evidence of the storage of commodities, issued by Lawrence shall have been surrendered to Lawrence and cancelled and all charges of Lawrence shall have been paid prior to the expiration of said term, and provided further, that Lawrence shall have the right to cancel this agreement at any time upon giving thirty (30)

days written notice to the depositor if the depositor is in arrears in payment of charges or is interfering with the operation of any warehouse established pursuant to this agreement.

In Witness Whereof, Lawrence has caused this agreement to be executed by its proper corporate officers and its corporate seal to be hereunto affixed, and the depositor has caused this agreement to be executed by its proper corporate officers and its corporate seal to be hereunto affixed, the day and year first above written.

LAWRENCE WAREHOUSE COMPANY

By A. N. Nickling
Vice-President

Attest:

M. C. Dedgen
Assistant Secretary

C. A. REED FURNITURE COMPANY, INC.

By M. N. Stewart

Attest:

R. W. Foster

Received copy of the within affidavit this 1st day of Dec., 1947. McLaughlin, McGinley & Hanson, by Y. Findling, Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 1, 1947. Edmund L. Smith, Clerk. [45]

[Minutes: Monday, December 15, 1947]

Present: The Honorable Leon R. Yankwich, District Judge.

For hearing motion of defendant Lawrence Warehouse Co., filed Dec. 1, 1947, for summary judgment; James A. McLaughlin, Esq., present for plaintiff; Wm. R. Ray, Clayton Straub, and James C. Ingebretsen, Esqs., present for defendants;

Attorney Ray argues in support of motion, and Attorney McLaughlin argues in opposition. Court orders that plaintiff have five days to submit additional authorities, and defendants have five days thereafter to reply, and that the cause then stand submitted. [46]

[Title of District Court and Cause]

ORDER ON MOTION FOR SUMMARY JUDGMENT

The Motion of the Defendant Lawrence Warehouse Company for a summary judgment against the plaintiff and in favor of the defendant, heretofore argued and submitted, is now decided as follows:

While the Prayer of the Complaint is directed against both defendants, the only cause of action against the defendant Lawrence Warehouse Company is the first one. This is bottomed upon the proposition that the warehouse receipts are invalid.

I am of the view that the point is not well taken.

The statutes under consideration (Sections 1858(b)(f) California Civil Code and Act 9059, California General Laws) have provided both civil and criminal [47] remedies for failure to comply with the statute. When this is the case, the general rule to the effect that when an instrument is issued in violation of a penal statute, it is invalid, does not apply. The object of the requirement that a warehouse receipt set forth the rate charged is to protect the warehouseman in his lien against the goods. Many similar statutes, including the Idaho statute, have been interpreted by judges in this Circuit and the ruling has been that the failure to do so does not render the warehouse receipt invalid. (See opinion of Judge Cavanah in Equitable Trust Company vs. A. C. White Lumber Company, D. C. Idaho, 1930, 41 F. (2) 60 at 65.)

The Motion of the defendant Lawrence Warehouse Company is, therefore, granted.

Dated this 29th day of December, 1947.

LEON R. YANKWICH

Judge

[Endorsed]: Filed Dec. 29, 1947. Edmund L. Smith, Clerk. [48]

In the District Court of the United States
Southern District of California
Central Division

No. 7747-Y

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of C. A. REED FURNITURE COMPANY, a corporation, Bankrupt,

Plaintiff,

vs.

CALIFORNIA BANK, a corporation, and LAWRENCE WAREHOUSE COMPANY, a corporation,

Defendants.

SUMMARY JUDGMENT

Defendant, Lawrence Warehouse Company, having duly served and filed Notice of Motion for Summary Judgment, and the same having come on regularly for hearing before this Court on the 15th day of December, 1947, and it appearing to the Court, and the Court finding that plaintiff's Complaint against said defendant, Lawrence Warehouse Company, on file herein does not state a cause of action against said defendant, Lawrence Warehouse [49] Company upon the basis of which this Court could grant relief, and it appearing and the Court finding that the warehouse receipts referred to in said Complaint were on their face in all respects valid and according to law; and it appearing and the Court finding that this is a

proper case for the rendering of a Summary Judgment in accordance with Rule 56 of the Rules of Civil Procedure for the Districts Courts of the United States.

Now, Therefore, It Is Hereby Ordered, Adjudged and *Agreed* that plaintiff take nothing from defendant, Lawrence Warehouse Company, by reason of his Complaint herein and that defendant, Lawrence Warehouse Company, have and is hereby granted judgment and its costs of suit incurred herein.

Done in Open Court this 5th day of January, 1948.

LEON R. YANKWICH
District Judge

Approved as to Form as provided in Rule 44.

McLAUGHLIN, McGINLEY & HANSON
By James A. McLaughlin
Attorneys for Plaintiff

Judgment entered Jan. 5, 1948. Docketed Jan. 5, 1948. C. O. Book 47, page 658. Edmund L. Smith, Clerk; by John A. Childress, Deputy.

[Endorsed]: Filed Jan. 5, 1948. Edmund L. Smith, Clerk. [50]

[Title of District Court and Cause]

NOTICE OF APPEAL ON MOTION FOR SUMMARY JUDGMENT

Notice is hereby given that Paul W. Sampsell, as Trustee in Bankruptcy for the Estate of C. A. Reed Furniture Company, a corporation, Bankrupt, plaintiff in the above-entitled action, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 5th day of January, 1948 in favor of defendant Lawrence Warehouse Company and against plaintiff above-named and from the whole of such judgment.

Dated: 8th day of January, 1948.

JAMES A. McLAUGHLIN and
FRANK C. WELLER
By James A. McLaughlin
Attorneys for Appellant

[Endorsed]: Filed & mld. Copies Musick, Burrell & Ingebretsen, Jan. 9, 1948. Edmund L. Smith, Clerk. [51]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 54 inclusive contain full, true and correct copies of Amended Complaint to Recover Preferences and Damages for Conversion of Personal Property of the Bankrupt and for an Accounting; Notice of Motion for Summary Judgment; Affidavit of E. C. Yuille; Minute Order Entered December 15, 1947; Order on Motion for Summary Judgment; Summary Judgment; Notice of Appeal on Motion for Summary Judgment; and Appellant's Designation of Contents of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $14.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 27 day of January, A. D. 1948.

(Seal) EDMUND L. SMITH
Clerk

By Theodore Hocke
Chief Deputy Clerk

[Endorsed]: No. 11844. United States Circuit Court of Appeals for the Ninth Circuit. Paul W. Sampsell, as Trustee in Bankruptcy for the Estate of C. A. Reed Furniture Company, a corporation, Bankrupt, Appellant, vs. Lawrence Warehouse Company, a corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed January 28, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11844

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of C. A. REED FURNITURE COMPANY, a corporation, Bankrupt,

Plaintiff and Appellant,

vs.

CALIFORNIA BANK, a corporation, and LAWRENCE WAREHOUSE COMPANY, a corporation,

Defendants,

LAWRENCE WAREHOUSE COMPANY, a corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS UPON WHICH HE INTENDS TO RELY ON APPEAL

To Paul P. O'Brien, Clerk of the Above Entitled Court:

Comes now the above named Appellant, and in connection with the above entitled appeal, hereby sets forth the points upon which he intends to rely on appeal:

1. Defendant Lawrence Warehouse Company is liable for conversion of mechandise covered by invalid warehouse receipts where it delivers such mechandise to the holder of the invalid warehouse receipt.

2. The warehouse receipts were invalid because they did not contain a statement of the rate of storage charges

per month or per season for the merchandise covered thereby, as required by Sections 1858(b) and 1858(f) of the Civil Code of the State of California.

The entire record as certified to you must be printed in its entirety as the above issues of law are framed by the pleadings and judgment in that record.

Dated: February 2, 1948.

JAMES A. McLAUGHLIN and
FRANK C. WELLER
By James A. McLaughlin
Attorneys for Plaintiff and Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 5, 1948. Paul P. O'Brien, Clerk.

No. 11844

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of C. A. REED FURNITURE COMPANY, a corporation, Bankrupt,

Appellant.

vs.

LAWRENCE WAREHOUSE, a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

McLAUGHLIN, McGINLEY & HANSON,
JAMES A. McLAUGHLIN,
FRANK C. WELLER,
1224 Bank of America Building, Los Angeles 14,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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No. 11844

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of C. A. REED FURNITURE COMPANY, a corporation, Bankrupt,

Appellant.

vs.

LAWRENCE WAREHOUSE, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts.

This is an appeal by plaintiff, trustee in bankruptcy, from a summary judgment granted on motion of the defendant and appellee, Lawrence Warehouse Company.

The facts from which the issues are drawn appear in the first cause of action in the amended complaint [R. 2-40] which was filed pursuant to Rule 15, Federal Rules of Civil Procedure, before any responsive pleading had been filed to the original complaint.

The second and third causes of action relate to other preferential transactions as to which the defendant, California Bank, is solely involved, and we are not concerned with those causes of action, because that defendant did not move for a summary judgment.

The appellee's motion for a summary judgment was supported by a single affidavit of one of its officers, but

the basis of the trial court's ruling was such that this affidavit has little importance in the determination of this appeal. For brevity, we will hereinafter refer to the amended complaint as "the complaint."

By his complaint, the plaintiff sought recovery from the appellee and the defendant, California Bank, for the value of merchandise belonging to, and warehoused by the bankrupt, C. A. Reed Furniture Company, with appellee, which in turn issued its warehouse receipts for such merchandise to California Bank, the pledgee. Except for the difference in dates, serial numbers and the merchandise covered thereby, these warehouse receipts were all in identical form to the one attached to the complaint as "Exhibit A." [R. 19-20.]

Each such receipt acknowledged the receipt by appellee of the merchandise, described on the face thereof, from the bankrupt, "for the account of and to be delivered without surrender of this warehouse receipt upon the written order of California Bank."

All of the merchandise involved in these various warehouse receipts is listed on "Exhibit B" to the complaint [R. 21-36] and is alleged to have had a value of $83,808.00 at the time it was wrongfully delivered by appellee to California Bank [R. 6], the pledgee of these warehouse receipts on account of loans made, prior thereto, to the bankrupt. [R. 4-6.] The unpaid balance of such loans aggregated $89,963.37 at the time the California Bank took possession of such merchandise on June 26, 1948. [R. 4.]

C. A. Reed Furniture Company was adjudicated a bankrupt on July 11, 1947 and plaintiff was thereupon appointed its trustee. [R. 2-3.] Prior to the filing of this action, California Bank had disposed of this mer-

chandise, so appellant sought a money judgment for its value in this action.

The basis on which this recovery was sought, was that the warehouse receipts were wholly void, and therefore conferred no right upon California Bank to the merchandise covered therein. Such defendant was therefore liable to the trustee for the value of the merchandise, and appellee was also liable in damages for such value for having delivered the merchandise to one having no rights therein or thereto.

The invalidity of these warehouse receipts arose from the fact that appellee had failed to have the warehouse receipts show on their faces the rate of storage charges per month or per season as required by section 1858b of the Civil Code of California.

Section 1858f of such Civil Code makes it a felony to violate any of the provisions of that section 1858b and provides heavy penalties by fine or imprisonment or both.

Under paragraphs XII and XIII of the complaint the necessary facts are alleged to show that the bankrupt was insolvent in the bankruptcy sense at the time that possession of this merchandise was delivered by appellee to the California Bank, and at the time that this bank disposed of the same. [R. 9-12.] Knowledge on the part of both appellee and California Bank of such insolvency is also alleged. [R. 10.] The extent of such continuing insolvency is further demonstrated by allegations showing debts of the bankrupt of approximately $173,717.96 as against assets of not to exceed $25,000.00. These computations do not include debts to secured creditors who have availed themselves of such security, nor do they include actions of this character to recover asserted preferential transfers as assets.

Jurisdiction.

Jurisdiction of this appeal is conferred by section 225(c) of Title 28, U. S. C. A., which includes "controversies, and cases had or brought in the district courts under Title 11, relating to bankruptcy, . . ." This jurisdiction is also conferred by section 47a of the Title 11, U. S. C. A.

See also *Childs v. Ultramares Corp.* (Second Circuit), 40 F. (2d) 474, at 477, where it is said:

> " 'Controversies' are ordinary suits in equity or actions at law between the trustee as such and adverse claimants of property; . . ."

A summary judgment is a final and appealable judgment. (*Bee Mach. Co. v. Freeman,,* 131 F. (2d) 190.)

The entire first cause of action is necessary to show jurisdiction in the sense of pleading a cause for relief in the District Court, but paragraph IV is the one that specifies the particular statutes conferring that court's jurisdiction. [R. 3-4.]

As therein alleged, the jurisdiction of the District Court over this action is conferred by sections 96(a), 96(b), 107(a) and 107(e) and 110(e) of Title 11, U. S. C. A. relating to recoveries for preferential and void transfers of property of the bankrupt.

Rule 20(a) of the Federal Rules of Civil Procedure authorizes the joinder of the two defendants in this action.

Appellant's Specification of Error.

The District Court erred in granting appellee's motion for a summary judgment and in causing such summary judgment to be entered. Stated in another way, that court erred in holding that the first cause of action did not state a cause of action.

Statement of Questions Involved.

The three legal contentions urged by appellee in support of its motion were:

(1) That the general rule, that a contract or other instrument (such as these warehouse receipts) issued or executed in violation of a criminal statute was *ipso facto* void, did not apply, because section 1858f of the Civil Code provided a civil remedy by suit for damages to anyone injured by such violation;

(2) That section 1858b and 1858f of the Civil Code had been repealed by implication when the Uniform Warehouse Receipts Act (Act 9059, Gen. Laws) was enacted in 1909; and

(3) That there was substantial compliance with the provisions of section 1858b because the warehouse receipt contained the following clause:

> "Subject to lien for storage, handling, insurance and other charges as per contract and lease with the industry served."

The decision of the District Court was predicated upon the first of the above contentions. If any of them were tenable, the judgment must stand, so we shall demonstrate that none of these three contentions are legally correct. There is not only no decision to sustain any of them, but they are each contrary to the established law.

The District Court in its decision has attempted to carve out an exception to the long standing and well established doctrine that an instrument issued in violation of a criminal statute is wholly void. There is no precedent for the rule announced by the District Court, and it is contrary to the reasoning behind all the decisions holding such instruments void.

We will deal with these three legal questions in the order in which we have previously stated them.

ARGUMENT.

POINT I.

Where an Instrument Is Executed Contrary to the Provisions of a Criminal Statute It Is Void for All Purposes. This Rule Is Not Affected by the Fact That the Statute May Also Confer Some Civil Remedy to a Party Injured.

The doctrine rendering such instruments void does not even depend upon whether a party has been injured. The document is void regardless of injury, and whether or not greater injury results from such invalidity than would flow from validity.

At the outset, it should be observed that the applicable law in testing the validity of these warehouse receipts is the law of the State of California. (8 Corpus Juris. Secundum, Bankruptcy, pp. 807 to 810.) The law of this state is so well settled on this subject of illegal contracts that it would only add confusion to enter into a prolonged consideration of the rules in all other states. It should be noted, however, that the rule in this state accords with that in the vast majority of the other states. (17 Corpus Juris. Secundum, Contracts, p. 557.)

Section 1858b of the Civil Code provides:

> "Warehouse receipts for property stored are of two classes: first, transferable or negotiable; and second, non-transferable or non-negotiable. Under the first of these classes the property is transferable by indorsement of the party to whose order such receipt was issued, and such indorsement is a valid transfer of the property represented by the receipt, and may be in blank or to the order of another. *All warehouse receipts must distinctly state on their face*

for what they are issued and its brands and distinguishing marks and the rate of storage per month or season, and, in the case of grain, the kind, the number of sacks, and pounds. If a receipt is not negotiable, it must have printed across its face in red ink, in bold, distinct letters, the word 'non-negotiable.'" (Italics ours.)

Section 1858f of that Code provides:

"Every warehouseman, wharfinger, or other person who violates any of the provisions of sections eighteen hundred and fifty-eight to eighteen hundred and fifty-eight e, inclusive, is guilty of a felony, and, upon conviction thereof, may be fined in a sum not exceeding five thousand dollars or imprisonment in the state prison not exceeding five years, or both. He is also liable to any person aggrieved by such violation for all damages, immediate or consequent, which he may have sustained therefrom, which damages may be recovered by a civil action in any court of competent jurisdiction, whether the offender has been convicted or not."

It is the last sentence of the above section which influenced the District Court in its decision. That court lost sight of the reason for the rule which makes all such instruments void. We are not here concerned with the question whether the legislature has the power to limit or destroy a remedy which would otherwise exist from an instrument being void, because the above statute does not attempt this.

THE ISSUANCE OF AN INSTRUMENT CONTRARY TO THE PROVISIONS OF A CRIMINAL STATUTE RENDERS IT VOID.

The rule is well established in this state, that the legislature cannot even expressly confer validity upon an instrument that is void because it violates the provisions of a criminal statute.

The case of *Berka v. Woodward,* 125 Cal. 119, involved a statute which made it a criminal offense for a city councilman to contract with the city. The plaintiff, a member of the city council, sought recovery for the value of lumber furnished the city, contending that Section 922 of the Political Code permitted such a recovery because the city council had approved the transaction, instead of repudiating it.

That section provided:

> "Every contract made in violation of any of the provisions of the two preceding sections may be avoided at the instance of any party except the officer interested therein."

In denying recovery the court said, at page 127:

> "The rule, further, is that where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it. (*Swanger v. Mayberry, supra; Santa Clara Mill etc. Co. v. Hayes,* 76 Cal. 390; 9 Am. St. Rep. 211; *Gardner v. Tatum,* 81 Cal. 370; *Morrill v. Nightingale,* 93 Cal. 458; *Wyman v. Moore,* 103 Cal. 214; *Visalia etc. Co. v. Sims,* 104 Cal. 332; 43 Am. St. Rep. 105; *Woods v. Armstrong,* 54 Ala. 150; 25 Am. Rep. 671; *Fowler v. Scully, supra; Seidenbender v. Charles,* 4

Serg. & R. 151; 8 Am. Dec. 682; *Brooks v. Cooper,* 50 N. J. Eq. 761; 35 Am. St. Rep. 793.)

> "Applying these principles to the contract before us, it is most manifest that it is not only against the express prohibition of the law, but that the law makes penal upon the part of a public officer the entering into it. We can yield no assent to the contention that our laws apply only to express contracts. The statute itself is general in its terms."

In holding that it was immaterial that the legislature had attempted to confer conditional validity on such a contract by making the contract merely voidable, at the instance of the city, the court said, at page 129:

> "The fact that the claim was allowed by the council does not give to it a validity which it otherwise did not possess. (*Santa Cruz Rock P. Co. v. Broderick,* 113 Cal. 628.) The duty of the treasurer is to pay only legal demands against his funds. The law will not imply a promise to pay for services illegally rendered under a contract expressly prohibited by law. (*Gardner v. Tatum, supra.*)"

The case of *Wread v. Coffey-Murray, Inc.,* 42 Cal. App. (2d) 783, lays down the same rule at pages 785 and 786.

THE WAREHOUSE RECEIPTS BEING VOID NO RIGHTS THEREIN PASSED TO THE CALIFORNIA BANK AS PLEDGEE.

In the present action, appellant is entitled to recover the value of its merchandise unless the defendant, California Bank, has a valid lien upon and a right to possession of it

at the time appellee delivered such merchandise to that defendant. The void warehouse receipts were impotent to confer any rights in that defendant, and appellee's delivery of such merchandise constituted a conversion. The bankrupt did not issue these void receipts. They were issued by its bailee, the appellee.

In *Hollywood State Bank v. Wilde,* 70 Cal. App. (2d) 103, void securities were pledged to that bank, and the court held that no rights whatever were conferred by such a pledge, regardless of the good faith or lack of knowledge on the part of the pledgee, of such invalidity. In holding that the pledgee could not invoke the defense of estoppel, the court said, at page 113:

> "It is statutory that while a non-negotiable written contract for the payment of money may be transferred by endorsement conveying thereby all rights of the assignor thereunder, yet it is 'subject to all equities and defenses existing in favor of the maker at the time of the indorsement.' (Civ. Code, sec. 1459.) From that section it must follow that there can be no estoppel by contract unless the contract is itself valid."

For other cases holding that good faith is immaterial, see:

Duntley v. Kagarise, 10 Cal. App. (2d) 397;

Boss v. Silent Drama Syn., 82 Cal. App. 109; and

Reno v. American Ice Machine Co., 72 Cal. App. 409.

IT IS NOT NECESSARY THAT THE STATUTE EXPRESSLY DECLARE THE INSTRUMENT TO BE VOID.

The rule as to invalidity of contracts which contain provisions contrary to a criminal statute or which are executed in violation thereof, does not depend upon any statute expressly declaring them to be void. The instruments are void regardless of the non-existence of such an express declaration.

See:

Smith v. Bach, 183 Cal. 259;

Berka v. Woodward, 125 Cal. 119;

Napa Valley Elec. Co. v. Calistoga Elec. Co., 38 Cal. App. 477;

King v. Johnson, 30 Cal. App. 63;

Wise v. Radis, 74 Cal. App. 765;

Firpo v. Murphy, 72 Cal. App. 249;

Buffendeau v. Brooks, 28 Cal. 641;

Le Rosa v. Glaze, 18 Cal. App. (2d) 354;

Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal. App. 592;

Otten v. Reisener Chocolate Co., 82 Cal. App. 83;

Boss v. Silent Drama Syndicate, 82 Cal. App. 109;

California Delta Farms v. Chinese American Farms, 207 Cal. 298;

City of Los Angeles v. Walterson, 8 Cal. App. (2d) 331;

Duntley v. Kagarise, 10 Cal. App. (2d) 397;

Hiroshima v. Bank of Italy, 78 Cal. App. 362;

Shasta County v. Woody, 90 Cal. App. 519;

Young v. Laguna L. & W. Co., 53 Cal. App. 178;

6 California Jurisprudence (Contracts), at page 105; and

17 Corpus Juris Secundum at page 555.

THERE IS NO BASIS IN POLICY FOR THE RULE WHICH THE DISTRICT COURT SEEKS TO ESTABLISH.

The authorities thus far cited show that the purpose of the rule which invalidates all such instruments is not to provide a remedy to one party against another. It is predicated upon a doctrine of policy that no enforcement, relief or defense may be asserted which is based upon any rights asserted under an illegal contract.

See:

Hollywood State Bank v. Wilde, 70 Cal. App. (2d) 103 at 112;

Reno v. American Ice Machine Co., 72 Cal. App. 409 at 413;

Black v. Solano Co., 114 Cal. App. 170 at 176; and

Cecil B. DeMille Productions v. Wooley (9th Circuit), 61 F. (2d) 45 at 48.

These cases show that the courts treat the illegal contract as non-existent, and this is why they permit the recovery of money or other property that has passed pursuant to the terms of the void contract. Such right of recovery is not conferred by statute but it exists by virtue of the common law rules that allow recovery on the common counts. The basis of such recovery is the implied contract to compensate for the things obtained through the void contract.

See:

Randall v. California L. B. Syndicate, 217 Cal. 594 at 598;

Castle v. Acme Ice Cream Co., 101 Cal. App. 94;

Mary Pickford Co. v. Bayley Bros., Inc., 12 Cal. (2d) 501 at 519; and

Hertz Drivurself Stations v. Ritter (9th Circuit), 91 F. (2d) 539.

For this reason, appellant is entitled to recover the value of the merchandise delivered pursuant to the terms of the void warehouse receipts. The receipts, being void, the pledgee bank is in the position of a total stranger. (*Hollywood State Bank v. Wilde,* 70 Cal. App. (2d) 103.)

Appellant does not deny the power of the legislature to provide specific remedies to persons who have parted with value under an illegal contract, but these remedies must be consistent with the invalidity which flows from the illegality. The legislature cannot make a contract illegal and at the same time declare it to be valid. (*Berka v. Woodward,* 125 Cal. 119, and *Wread v. Coffey-Murray, Inc.,* 42 Cal. App. (2d) 783.)

Any remedy or relief provided by statute must, therefore, be predicated upon the proposition that the illegal contract is void. We do not need to concern ourselves with the question whether the legislature might have taken away the right of recovery by one who has parted with value under an illegal contract, because there is nothing in Section 1858f of the Civil Code which purports to limit a recovery of the character herein sought.

An express statutory provision for a particular remedy or relief does not destroy remedies and rights of recovery which already exist under the common law. (See *Estate of Ward,* 127 Cal. App. 347 at 354, and the numerous authorities cited therein.)

The most that the sentence in Section 1858f attempts to do is to express a right of recovery for anyone injured by such a warehouse receipt. It does not attempt

to confer either a limited or a complete validity on such warehouse receipt. If it had so attempted, the provision would have been subject to the same infirmity as the statutes that attempted to make such illegal contracts merely voidable.

See:

Berka v. Woodward (*supra*), and
Wread v. Coffey-Murray, Inc. (*supra*).

The decision of the District Court is therefore erroneous in that:

(1) It implies a legislative intent to declare an illegal contract valid;

(2) It implies such an intent in an instance where a fair construction of the statute does not evidence any such purpose;

(3) It assumes that the express provision in the statute for a recovery of damages to persons injured, takes away existing common law remedies.

The Warehouse Receipts Being Void Both Defendants Are Equally Liable.

It is of no consequence that the pledgee's lien of the California Bank would have been valid if the warehouse receipts had not been void. When a valid lien is not perfected prior to the four-month period preceding the bankruptcy the lien claimant acquires no valid rights to the property.

See:

In re Talbot Canning Corp., 35 Fed. Supp. 680, and 39 Fed. Supp. 858;

Kirst v. Buffalo Cold Storage Co., 36 Fed. Supp. 401;

In re Herksimer Mills Co., Inc., 39 Fed. Supp. 625;

Susquehanna T. & S. D. Co. v. U. T. & T. Co., 6 F. (2d) 179;

In re Silver Cup Bar & Grill, 50 Fed. Supp. 528;

In re Seim Const. Co., 37 Fed. Supp. 855;

Corn Exchange N. B. & Tr. Co. v. Klauder, 318 U. S. 434;

Arena v. Bank of Italy, 194 Cal. 195;

Chichester v. Commercial Credit Co., 37 Cal. App. (2d) 439; and

In re Boswell, 95 F. (2d) 239.

Sections 96(a), 96(b), 107(e) and 110(e) of 11 United States Code Annotated, specifically confer upon the trustee the right to recover the property or its value in instances such as this.

See also: 8 Corpus Juris Secundum (Bankruptcy), page 841.

The act of appellee in delivering the merchandise to the California Bank constituted a conversion within the above provisions, as well as under the law of this state.

See:

Section 10, Act 9059, General Laws of California; and

Aronson v. Bank of America, 9 Cal. (2d) 640 at 643.

There is no doubt that the defendant, California Bank, may participate in the assets of the bankrupt along with other general creditors, but it should have no advantages of a lien claimant where the lien is void. By the same token, appellee may have a claim against the California Bank to recover the value of the merchandise which appellee erroneously delivered to that bank, but we are not concerned with these remedies in this action.

THE AUTHORITY ON WHICH THE DISTRICT COURT PREDICATED THIS DECISION IS IN NO WAY PERTINENT.

The District Court based its decision upon the case of *Equitable Trust Co. v. A. C. White Lumber Co.* (D. C. Idaho), 41 F. (2d) 60. That case involved an Idaho statute requiring warehouse receipts to show the rate of storage charges on their face and the court held that the failure of the warehouse receipt to contain such recital did not invalidate the receipt but there was nothing in the case indicating that any criminal statute such as the California statute was involved. There was no mention whatever of the receipt being void because of the violation of a criminal statute so the case cannot operate as a precedent in the present case.

Even if there had been a criminal statute involved, the decision of that court would be predicated upon the Idaho law whereas the Idaho law cannot take precedence over the established California law in this case.

POINT II.

Section 1858b and 1858f of the Civil Code Being Criminal Statutes Were Not Repealed by the Adoption of the Uniform Warehouse Receipts Act.

The above sections of the Civil Code were adopted in 1905, whereas the Uniform Warehouse Receipts Act was adopted in 1909. This law as subsequently amended is embodied in Act 9059, Volume 3, Deering's California General Laws.

Section 2 of that act sets forth several requirements as to what warehouse receipts must contain. It includes the requirements specified in Section 1858b of the Civil Code.

Section 2 of Act 9059 provides:

> "Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms—
>
> "(a) The location of the warehouse where the goods are stored,
>
> "(b) The date or issue of the receipt,
>
> "(c) The consecutive number of the receipt,
>
> "(d) A statement whether the goods received will be delivered to the bearer, or to a specified person, or to a specified person or his order,
>
> "(e) The rate of storage charges,
>
> "(f) A description of the goods or of the packages containing them,
>
> "(g) The signature of the warehouseman, which may be made by his authorized agent,
>
> "(h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly

or in common with others, the fact of such ownership, and

"(i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred and the purpose thereof is sufficient.

"A warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of the terms herein required."

There is nothing contained in that section that is repugnant to the provisions of Section 1858b of the Civil Code. The difference arises in that Section 2 of the Act sets forth additional requirements, and in the further fact that the Uniform Warehouse Receipts Act (Act 9059) is in no sense a criminal statute. It contains no language making a violation of any of its provisions a crime.

The provisions contained in Sections 1858 to 1858f of the Civil Code are definitely regulatory and penal in character in that the last section makes violation of any of the other sections a felony. This is in no way repugnant to the Uniform Warehouse Receipts Act, but is additional matter not covered by that Act.

Section 60 of the Uniform Act provides:

"All acts or parts of acts inconsistent with this act are hereby repealed."

It will be noted that this is not an express repeal of all other laws relating to warehousing. It is only a repeal of any other laws that may be *inconsistent.*

It should also be observed that Section 56 of that Act evidences an intent to preserve any other laws which for any reason might result in a warehouse receipt being invalid.

That section provides:

> "In any case not provided for in this act, the rules of law and equity, including the law-merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or *other invalidating cause,* shall govern." (Italics ours.)

In *People v. Carter,* 131 Cal. App. 177, the court stated the general rule that repeals by implication are not favored in law. It then proceeded to state the strict requirements for such a repeal by implication, at page 181, as follows:

> "But the decisions also clearly indicate that, unless the object or the purpose of the *quasi*-repealing statute is identical with that of the statute claimed to be so repealed, the effect is not that a repeal has been effected; but, to the contrary, unless, in addition thereto, such statutes are repugnant one to the other, or the provisions of the later statute are inconsistent with those of the earlier statute, each of such statutes will remain as a declaration of the law which purportedly is declared therein. (23 Cal. Jur. 693 *et seq.;* Sec. 325, Pol. Code.)"

Before a repeal by implication can be operative, it is also necessary that the objects of the two statutes must be identical and co-extensive.

See:

Napa State Hospital v. Yuba County, 137 Cal. 378 at 383;

People v. Platt, 67 Cal. 21 at 22;

22 California Jurisprudence (Statutes), Section 85 at page 698; and

59 Corpus Juris (Statutes), Section 520 at page 921.

There can be no repeal by implication for each of the following reasons:

(1) There is nothing in the Civil Code section that is inconsistent with or repugnant to the provisions of the Uniform Warehouse Receipts Act; and

(2) The objects of the two laws are neither identical nor co-extensive. One imposes criminal sanctions and the other does not.

POINT III.

The Reference in the Warehouse Receipts to a Contract and a Lease Did Not Meet the Statutory Requirement That the Rate of Storage Charges Appear on Their Face.

The nearest approach to compliance with the provisions of Section 1858b of the Civil Code is the following clause on the face of the receipts:

> "Subject to lien for storage, handling, insurance and *other charges* as per contract and lease with the industry served." (Italics ours.)

At the outset, it should be noted that reference to this contract and lease is not made for the purpose of ascertaining the rate of storage charges per month or per season. "Storage" is mentioned first following the word "lien," but no rate or amount is shown. It is the "other charges" that reference is made to the contract and lease for.

The affidavit of E. C. Yuille filed in support of the motion for summary judgment has attached to it a photostat of the contract to which it is claimed the receipts refer. [R. 43-48.] This is a field warehousing agreement between appellee and the bankrupt, dated November 14, 1945, in which the bankrupt is referred to as "the depositor" and the appellant as "Lawrence."

The language therein as to charges is as follows:

> "3. The depositor agrees to pay to Lawrence for conducting such field warehouse or warehouses, and for storing commodities therein, the following:

"Storage Charges:

"FURNITURE MANUFACTURING MATERIALS:

"One tenth of one percent (1/10 of 1%) of value of commodities stored per calendar month or fraction thereof. The second party agrees to report to the first party the values of commodities for which warehouse receipts are issued.

"LOCATION CHARGE:

"$250.00 per year to cover the cost of Fidelity bonds on warehouse employees, regular examinations, supplies, etc., payable upon the issuance of the first warehouse receipt or other evidence of deposit and annually thereafter.

"Premiums for insurance on commodities represented by outstanding insured warehouse receipts as provided in the 'Insurance Agreement' signed by the depositor and Lawrence.

"The storage charges above set forth are subject to an annual minimum payment of Two Hundred Fifty Dollars ($250.00) payable on the date of this agreement and annually thereafter on the same day of each succeeding year during the term of this agreement. Storage charges accruing in excess of minimum payable on or before ten (10) days after date of invoice.

"The actual cost incurred by Lawrence for all employees required by Lawrence in the conduct of said warehouse or warehouses, and in the storing and handling of commodities therein, plus ten percent (10%), payable on or before ten (10) days after date of invoice, such ten percent (10%) to be deducted if all invoices are paid when due.

"All license fees, taxes or charges levied or imposed by Federal, State, County or Municipal Gov-

ernments or governmental agencies upon the operation of said warehouses, payable upon presentation of invoice.

"At Cost for installation, preparation of documents, etc., non-recurring, payable in advance.

"Regular warehouse examination, $..... annually, payable in advance.

"Special examination at cost, payable upon presentation of invoice.

"All expenses including attorneys' fees incurred by Lawrence incident to conducting any warehouse under this agreement, maintaining possession of the warehoused commodities for the benefit of warehouse receipt holders and the depositor, and in connection with any litigation in which Lawrence or the depositor is a party, payable upon presentation of invoice." [R. 45-46.]

Even if all these provisions had appeared on the face of the receipts, they would not have met the requirements of the statute as they do not show any rate of such charges per month or per season. Instead, they obligate the bankrupt to pay a number of diversified charges to be determined by various future contingencies.

The provisions of the statute are specific. They require the rate to be shown on the face. Assume that this contract had shown the rate, there would still be no compliance. The courts have uniformly construed the word "face" to mean in the instrument itself—not in some other instrument.

See:

Cunningham v. Great So. Life Ins. Co., Tex. Civ. App., 66 S. W. (2d) 765 at 773;

Southern Mut. Ins. Co. v. Trunley, 100 Ga. 296, 27 S. E. 975;

In re Stoneman, 146 N. Y. S. 172 at 174;

Investors Syn. v. Willents (D. C. Minn.), 45 F. (2d) 900 at 902; and

Burns v. Corn Exch. Natl. Bk. of Omaha, 33 Wyo. 474, 240 Pac. 683 at 687.

This no more closely approaches compliance than if the warehouse receipt has referred to the company's books of account for information as to the storage charges.

THE CLEAR STATUTORY REQUIREMENT CAN NOT BE RELAXED BY JUDICIAL CONSTRUCTION.

The fact that the appellee attempted to relax the statutory requirement to fit more conveniently into its plan of field warehousing adds no mitigation. One of the reasons for statutes governing warehousing is to prevent warehousing from becoming a mere fiction to employ the cloak but not the substance in obtaining credit.

See:

McCaffery C. Co., Inc. v. Bank of America, 109 Cal. App. 414;

Harry Hall & Co. v. Consol. Packing Co., 55 Cal. App. (2d) 621;

First Camden Natl. Bank & Trust Co. v. J. R. Watkins Co., 122 F. (2d) 826; and

Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. Ed. 1143.

In recognition of the legislature's power to determine the economic policy or necessity behind a statute the court in *Max Factor & Co. v. Kunsman,* 5 Cal. (2d) 446, said, at page 455:

> "As already indicated, the state legislature, by the adoption of the Cartwright Act, *supra,* adopted in 1907, partially, at least, the first economic policy above discussed. By the enactment of the Fair Trade Act in 1931, as amended in 1933, the state legislature, for reasons known to it and which we must presume were sufficient, has seen fit to attempt to change its former policy, and to adopt the second economic concept above discussed. In so far as the statute involves a mere change in the economic policy of the state, this court has no power or right to interfere. The members of the court may or may not agree with the economic philosophy of the Fair Trade Act, but it is no part of the duty of this court to determine whether the policy embodied in the statute is wise or unwise. It is primarily a legislative and not a judicial function to determine economic policy. The power of the court is limited to determining whether the subject of the leglislation is within the state's power, and if so to determine whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained. These principles have frequently been stated by the United States Supreme Court."

See also:

In re Lasswell, 1 Cal. App. (2d) 183.

There are many instances of invalidity where the violation was much more technical than in this case.

See:

Coast Amusements, Inc. v. Stinman, 115 Cal. App. 746;

Parrish v. Am. Ry. Emp. Pub. Co., 83 Cal. App. 298;

Nat. Stone & Tile Co. v. Voorheis, 93 Cal. App. 738;

Domenigoni v. Imperial Live Stock & Mg. Co., 189 Cal. 467;

Jones v. Balboa Motor Corp., 206 Cal. 98;

Becker v. Steinman, 115 Cal. App. 740;

Live Oak Cemetery Assn. v. Adamson, 106 Cal. App. 783;

Castle v. Acme Ice Cream Co., 101 Cal. App. 94; and

Otten v. Riessener Chocolate Co., 82 Cal. App. 83.

This violation is explicit and direct, and the consequences of invalidity are, therefore, automatic.

Conclusion.

There is no basis upon which appellee can escape the legal consequences of its act, and it is respectfully submitted that the judgment should be reversed.

CRAIG & WELLER,
McLAUGHLIN, McGINLEY & HANSON,
By JAMES A. McLAUGHLIN,
Attorneys for Appellant.

No. 11,844

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of C. A. Reed Furniture Company (a Corporation), Bankrupt,

Appellant,

vs.

CALIFORNIA BANK (a Corporation), and LAWRENCE WAREHOUSE COMPANY (a Corporation),

Defendants,

LAWRENCE WAREHOUSE COMPANY (a Corporation),

Appellee.

BRIEF FOR APPELLEE.

W. R. WALLACE, JR.,
W. R. RAY,
JOSEPH MARTIN, JR.,
WILLIAMSON & WALLACE,
310 Sansome Street, San Francisco,
Attorneys for Appellee.

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No. 11,844

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Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Appellee agrees that the jurisdictional statement on page 4 of appellant's brief is correct.

STATEMENT OF THE CASE.

This is an action by the trustee in bankruptcy of the C. A. Reed Furniture Company to invalidate cer-

tain non-negotiable warehouse receipts issued by appellee Lawrence Warehouse Company to the California Bank covering goods deposited with Lawrence by the bankrupt. There are no disputed questions of fact. The only controversy between the parties relates to the legal effect, if any, of Section 1858 of the Civil Code of California upon the receipts in question. The question arose in the District Court upon the motion of appellee for summary judgment. After argument, the District Court granted appellee's motion and entered a summary judgment. This appeal followed.

The opening statement of appellant's brief is substantially correct. It should be noted, however, that all of the receipts which are the subject of this action were non-negotiable. In addition, appellant does not claim that any of the funds received on the security of these receipts went to, or benefited anyone other than the C. A. Reed Furniture Company, appellant's predecessor in interest.

Briefly stated, appellant's only claim is that the warehouse receipts are void under the provisions of Section 1858(b) and (f) of the Civil Code of California. The basis of this claim is that Section 1858(b) states that warehouse receipts must distinctly state on their face the rate of storage charges per month or season. The non-negotiable warehouse receipts which are the subject of this controversy, contain on the face thereof the following statement:

> "Subject to lien for storage, handling, insurance and other charges as per contract and lease with the industry served."

Appellant's claim is that the above quoted statement is not a sufficient compliance with Section 1858(b) and that the absence of specific charges on the face of the receipt render the receipts void.

We maintained in the Court below, and maintain here, (1) that the issuance of and the form, contents and effect of warehouse receipts in the State of California are governed by the provisions of the Uniform Warehouse Receipts Act and not by Section 1858 of the Civil Code; (2) that the receipts involved herein conform to the provisions of the Uniform Warehouse Receipts Act; (3) that even should the Court consider Section 1858 to be applicable, the receipts are still valid in the hands of the bank; (4) that the reference to storage charges contained on the receipts is sufficient under either statute.

It is undisputed that if these warehouse receipts are valid, appellant has no cause of action against appellee Lawrence Warehouse Company.

ARGUMENT.

Appellant's brief abounds in citations supporting general propositions with which there can be no quarrel, but which have no application to the case at bar. In view of the great weight of authority upholding the validity of these receipts, we feel that it would serve no useful purpose to answer appellant's brief in detail. Instead we shall present a positive argument supporting our position, and in the course

of this argument we shall comment on the few cases cited by appellant which deserve mention.

In the consideration of this case, these receipts receive the benefit of the presumption of legality established by Section 1643 of the Civil Code which reads:

> "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

Appellee Lawrence Warehouse Company submits that the warehouse receipts in issue are valid and the decision and judgment of the District Court is correct. Appellee's brief in support of its position will be divided into three parts. Part One will first demonstrate that the Uniform Warehouse Receipts Act (California General Laws, Act 9059, hereinafter called "Uniform Act") and not Section 1858 of the Civil Code of the State of California governs the decision of this case. Then it will be shown that the receipts in question are valid under the Uniform Act. Appellee firmly believes that this completely disposes of appellant's case.

For the sake of argument, however, we shall then proceed to demonstrate in Part II that, even if this case is governed by Section 1858, appellant cannot prevail. This position is taken on the following grounds:

1. A violation of the requirements of Section 1858 does not invalidate a warehouse receipt;

2. The receipts in question comply with Section 1858.

Part Three will merely show that there is no issue of an illegal preference involved in this appeal.

PART I.

THE RECEIPTS INVOLVED HEREIN ARE VALID UNDER SECTION 2 OF THE UNIFORM NEGOTIABLE WAREHOUSE RECEIPTS ACT.

(a) The Uniform Warehouse Receipts Act controls the decision in this case.

Appellant's entire case rests on the theory that Section 1858 invalidates these warehouse receipts. He studiously avoids any mention of the Uniform Negotiable Warehouse Receipts Act. It is our contention that appellant's theory is erroneous. We submit that the Uniform Act was intended to revise completely the statutory law of California with regard to warehouse receipts and to supersede Section 1858.

Let us first compare the two statutes in a general way. Section 1858 was adopted in 1901 and contains only seven subdivisions while the Uniform Act was adopted in 1909 and has sixty sections dealing with every phase of warehousing. It is immediately apparent that the Uniform Act is a much more mature and considered statute. There are differences, however, not only in the quality of the two laws; they are often inconsistent and contradictory. We shall set forth a few examples. The last clause of Section

1858 prohibits the issuance of a second receipt on property on which there is already an outstanding receipt. This would apparently preclude the issuance of duplicate receipts which is permitted by Section 6 of the Uniform Act. Certainly the definitions of negotiable and non-negotiable receipts found in Sections 4 and 5 of the Uniform Act are the controlling definitions in California today. A non-negotiable receipt is not even defined in Section 1858, and the definition of a negotiable receipt is, to say the least, cumbersome. The earlier statute requires the words "non-negotiable" to be printed in red ink. The Uniform Act does not specify any particular color. (Under appellant's theory a receipt would be void if the words "non-negotiable" were printed in black!) The Uniform Act contains no provision requiring the warehouseman to indorse on the back of the receipt "the amount and date of delivery" prior to delivery of the goods as does Section 1858(c).

A further catalogue of inconsistencies and contradictions is unnecessary. It is apparent that Section 1858 differs radically from the Uniform Act. The two cannot be regarded as merely complementing each other. There are too many ways in which they conflict to permit them to exist side by side. One must have precedence, and, as we shall demonstrate, it has long since been decided that the Uniform Act is paramount.

Now let us turn to a comparison of these statutes as they touch the receipts in issue. Both Section 1858 of the Civil Code and Section 2 of the Uniform

Act prescribe the contents of warehouse receipts. The purpose of both statutes was to provide a certain degree of protection to receipt holders (who, let it be noted, are not necessarily the depositors). Compared to the protection later given by Section 2 of the Uniform Act, that conferred by Section 1858 is crude and incomplete. Clearly the later act was intended to elaborate and supersede the earlier. If, as contended by appellant, Section 1858 requires the Court to hold these receipts void (in conflict with the interpretation of the Uniform Act) then it, or so much of it as requires this result, was repealed by the enactment of the later statute.

Appellant's brief cites and quotes many general statements concerning the repeal of statutes by later enactments. With these statements we have neither quarrel nor concern. They do not apply to this case because the provisions of the Uniform Act are specific as to its effect on earlier laws, and the Courts, including the Supreme Court of the United States, this Court and the California Courts—have consistently adhered to the policy of looking only to the Uniform Act.

Sections 57 and 60 of the Uniform Act read as follows:

> "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." (Section 57).
>
> "All acts or parts of acts inconsistent with this act are hereby repealed." (Section 60).

These sections are not merely empty phrases. They state clearly what they mean and they mean exactly what they say. The Courts have so held.

The Supreme Court of the United States has said the following as to the effect of the Uniform Act:

> "It is said that under the law of Louisiana, as it stood prior to the enactment of the uniform warehouse receipts act, the Commercial Bank would not have taken title as against the Canal-Louisiana Bank (cases cited); and it is urged that the new statute is but a step in the development of the law, and that decisions under the former state statutes are safe guides to its construction. * * * It is apparent that if these uniform acts are construed in the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity, and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws. * * * This rule of construction requires that in order to accomplish the beneficent object of unifying, so far as this is possible under our dual system, the commercial law of the country, there should be taken into consideration the fundamental purpose of the uniform act, and that it should not be regarded merely as an offshoot of local law. The cardinal principle of the act—which has been adopted in many states—is to give effect, within the limits stated, to the mercantile view of documents of title. There had been statutes in some of the states dealing with such documents, but there still remained diversity of legal rights under similar commercial trans-

actions. We think that the principle of the uniform act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it;" *(Commercial Nat. Bank v. Canal-Louisiana B. & T. Co.,* 239 U. S. 520, 528-529, 60 L. Ed. 417, 421-422 (1915).)

This Court in the case of *Heffron v. Bank of America,* 113 F. (2d) 240 (1940), declared that Section 3440 of the Civil Code of California was repealed in so far as it interfered with the operation of the Uniform Act:

> "The California Warehouse Receipts Act, Deering's General Laws, 1937, Act 9059, enacted in 1909 and several times amended, expressly repeals all acts or parts of acts in conflict with it. We are satisfied that this statute exclusively governs the decision to be made here." (p. 242.)

> "Indeed the general scheme of the Warehouse Receipts Act to achieve uniformity, and to effect the secure and ready use of warehouse receipts as instruments of credit, is inconsistent with the notion that the business world must look to something other than the observance of the definite and comprehensive terms of the act itself." (p. 243.)

The California Court in *Jewett v. City Transfer & Storage Co.,* 128 C. A. 556 (1933), reached a similar result, saying:

> "Although in the law the repeal of a statute by implication is not favored, when on comparison of the later law with the earlier statute

it becomes apparent that the later law is a revision of the entire subject matter embodied in the respective legislative acts, and that it is designed as a substitute for the earlier statute, the later law is deemed to supersede or repeal the earlier one. * * *

"Considering the provisions of the statute known as the Warehouse Receipts Act, it is apparent that its purpose was to revise the entire subject matter relating to the general business of conducting a public warehouse. As hereinbefore indicated, if by any legal reason it may be held that any of the provisions of Sections 3051 and 3052 of the Civil Code apply to the subject of liens of warehousemen, those provisions, as to such liens, must be deemed repealed by the later legislative act." (pages 561 and 562.)

See also:

Salt River Valley Water Users Ass'n. v. Peoria Ginning Co., 231 P. 415 (Ariz., 1924);

Mason v. Exporters & Traders Compress Co., 94 S. W. (2d) 758 (Tex., 1936).

In view of this insistence on uniformity, it cannot be contended that the California Legislature intended to permit Section 1858 to interfere with the Uniform Act.

(b) These receipts are valid under the uniform act.

It is our belief that the statement printed on the face of the warehouse receipts here in question in effect incorporated into those receipts the specific

contracts setting forth the various warehouse charges and therefore is a valid compliance with Section 1858 and Section 2 of the Uniform Act. For the sake of argument, however, let us assume that our views are incorrect and that there was no statement on the warehouse receipt with reference to charges.

What then have the Courts found to be the effect of the omission from a warehouse receipt of one of the requirements of Section 2? Appellant's brief is so barren of cases dealing with this subject that the Court might be led to believe that this was a matter of first impression. Such is far from the case. A long line of decisions consistently upholds the validity of receipts which are lacking one or more of the requirements of that section.

In *Equitable Trust Co. v. A. C. White Lumber Co.,* 41 F. (2d) 60 (D. C. Id., 1930), the Court dealt with the appellee's contention in the following language:

> "The only purpose of embodying in the receipt the rate of storage charges, or liabilities incurred by the warehouseman, is to preserve the lien and secure the payment to the warehouseman of such charges. (Citing cases). So the proper construction of the statute, when applied to the receipts in question, is that the receipts are not rendered invalid or non-negotiable by the omission of the rate of storage charges, if such appears therein." (p. 65.)

The Illinois Supreme Court in *Manufacturer's Mercantile Co. v. Monarch Refrigerating Co.,* 107 N. E.

885 (1915), reached the same result as to receipts on which the storage charges were left blank, saying:

> "The requirements of Section 2 were imposed for the benefit of the holder of the receipt and of the purchasers from him. It was not intended that a failure to observe them should render the receipt void in the hands of the holder." (p. 887.)

In *New Jersey Title Guarantee & Trust Co. v. Rector,* 75 A. 931 (N. J. 1910), the Court held that the omission of storage charges did not affect the validity of a receipt. It said at page 932:

> "The receipt in this case is not a negotiable one, and it is not pretended that any person has suffered any damage because of the alleged omission of two of the terms named in the act, but the warehouseman in such case is liable under Section 7 to any person purchasing a receipt, supposing it to be negotiable, if the warehouseman neglects to mark it 'non-negotiable.' In each case the terms recited in the act are rather for the benefit of third persons or innocent holders than the original parties, and in either case omissions do not destroy the character of the writing as a warehouseman's receipt."

See also:

> *Joseph v. P. Viane, Inc.,* 194 N.Y.S. 235 (1922), a case in which the receipt contained almost none of the requirements of Section 2 and was still held valid.

It could serve no useful purpose to discuss and quote from all of the decisions sustaining the validity of these receipts. Suffice it to say that in each of

the following cases the validity of the receipts in question was upheld.

Woldson v. Davenport Mill & Elevator Co., 13 P. (2d) 478 (Wash. 1932) (Section 53 of the Uniform Act provided a criminal penalty for failing to state that the goods covered by a receipt were owned by the warehouseman. Despite the fact that this was not done the receipts were held valid);

Smith Bros. Co. v. Reicheimer, 83 So. 255 (La. 1919) (rate of storage omitted);

Arbuthnot v. Reicheimer, 72 So. 251 (La. 1916 (rate of storage omitted);

In re Quaker City Cold Storage Co., 49 F. Supp. 60 (D.C. Pa. 1943) (affd. 138 F. (2d) 566) (C.C.A. 3rd 1943) (amount of advances unspecified);

Laube v. Seattle Nat. Bank, 228 P. 594 (Wash. 1924) (location of warehouse not stated);

Finn v. Erickson, 269 P. 232 (Ore. 1928) (charges and advances omitted);

Bank of California Nat. Ass'n. v. Schmalz, 9 P. (2d) 112 (Ore. 1932) (receipts not numbered consecutively).

Appellant attempts to avoid this obvious conflict between his interpretation of Section 1858 and the general interpretation of Section 2. He says that the Uniform Act is not a penal act. Even a superficial reading of Sections 50 through 55 shows this to be an erroneous assumption. These sections set forth criminal penalties for:

(1) Issuance of receipts for goods which have not been received.

(2) Issuance of receipts containing false statements.

(3) Issuance of receipts not stating fact that the commodities are owned by warehouseman.

(4) Delivery of goods without obtaining the surrender of a negotiable receipt.

(5) The negotiation of a receipt issued for mortgaged goods.

Here we see a comprehensive treatment of the criminal penalties connected with warehouse receipts. It would be difficult to contend that the legislature also intended the Courts to look to other antecedent statutes for further penalties on subjects specifically covered by the Uniform Act.

Appellant also says that Section 1858 is merely cumulative—that is to say that it merely adds a more severe penalty to those provided by the Uniform Act. Yet the basis of his action is that Section 1858 makes the receipts invalid, whereas under the Uniform Act they would be valid. Surely this is a substantive difference in direct conflict with and thwarting the purposes of the Uniform Act.

It must be remembered that field warehousing is an old and well established business. The following facts with respect to it will be found in *Financing Inventory on Field Warehouse Receipts,* Jacoby and Saulnier (National Bureau of Economic Research

1944), pages 43 *et seq.* In 1941, almost two-thirds of the banks in the United States which engaged in business loans did some financing by means of warehouse receipts. The loans against such receipts aggregated over $130,000,000.00 and formed 2% of the "commercial and industrial" loans of commercial banks. It is noteworthy that the Pacific Coast is one of the two geographic regions having the highest frequency of this type of financing. This is mainly due to the great number of canning and lumber concerns which find it particularly suited to their needs.

Appellee, Lawrence Warehouse Company, now conducts more than 2,000 field warehouses in almost every state. It is only one of the companies so engaged. The receipts under consideration embody the standard method for quoting storage rates for field warehousing. In such form the receipts are valid all over the United States. It would indeed be unfortunate if, after the adoption of the Uniform Act, a different result should obtain in California.

We hold to the premise that in adopting the Uniform Act, the California Legislature believed that it was fostering uniformity, standardizing a method of financing by means of warehouse receipts and facilitating commercial intercourse. The decisions of the Courts fully support this premise. Such purposes can hardly be realized if warehouse receipts, valid in all other jurisdictions, are invalid in California because of a statute which far antedates the Uniform Act.

We submit that Section 1858 of the Civil Code of California, or so much of it as is inconsistent with the Uniform Act, was repealed by the adoption of the latter. As the receipts in question are valid under the Uniform Act, appellant's cause of action against appellee Lawrence Warehouse Company must fail.

PART II.

POINT 1.

SECTION 1858 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA DOES NOT INTEND TO INVALIDATE RECEIPTS ISSUED IN VIOLATION THEREOF.

We have shown that Section 1858 has no application to this case. Conceding its application, however, for the sake of argument, it does not follow, as claimed by appellant, that these receipts are void.

Appellant cites a plethora of cases supporting the proposition that contracts made in violation of a criminal statute are void. With this proposition as it is applied in the cited cases we take no issue. We wish to point out, however, that none of these cases deals with Section 1858 or with warehouse receipts. Almost without exception they deal with the sale of land on the basis of unrecorded maps, with contracts made by public officials as individuals with the community which they serve, with the failure to secure a real estate broker's license, and with the sale of securities in violation of the California Corporate Securities Act. (In this connection it is interesting to

note that such sales do not always invalidate the securities under California law. (*Eberhard v. Pacific Southwest L. & M. Corp.*, 215 Cal. 226 (1932); 34 Cal. Law Review 543, 552 (1946).)

Appellant seems to forget that there are no iron-clad rules of statutory construction. The primary task in each case is to determine the intent of the legislature passing the statute. In the cases cited by appellant the legislature either specifically declared contracts made in violation of statutes void or the purpose of the legislation could be accomplished only by invalidating them. The rule stated in 6 R.C.L. 701, reads as follows:

> "The rule that a contract is invalid if it conflicts with a statute is, however, not an inflexible one. It is only when the statute is silent, and contains nothing from which the contrary is to be inferred, that the contract is void. Therefore where a statute which prohibits a contract at the same time also limits the effect, or declares the consequences which shall attach to the making of it, the general rule that contracts prohibited by statute are void does not apply."

Our task is, then, to determine the legislative intent in enacting Section 1858.

In conformity with the rule stated above, most statutes of the type of Section 1858 have been held not to invalidate contracts made in violation thereof. The Supreme Court of the United States in *Harris v. Runnels,* 12 How. 79, 84, 13 L. Ed. 901, 903 (1851), dealt with a similar statute in the following language:

> "It is true that a statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the Legislature to avoid a contract made in contravention of it."

One of the most elaborate discussions of the precedents on this point is to be found in *In re T. H. Bunch Co.,* 180 F. 519 (D. C. Ark., 1910) where at page 527, the Court said:

> "When a statute imposes specific penalties for its violation, where the act is not malum in se, and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the intention of the lawmakers to render such contracts illegal and unenforceable."

See also:

Adams Express Co. v. Darden, 286 F. 61 (C.C.A. 6th, 1923);

Furlong v. Johnston, 204 N.Y.S. 710 (App. Div. 1924);

Uhlmann v. Kin Dow, 193 P. 435 (Ore. 1920).

The above rule has been specifically recognized by the Supreme Court of the State of California in *Bentley v. Hurlburt,* 153 C. 796 (1908), in the following language:

> "The rule [that a contract in violation of a statute is void] is, however, not without exceptions. In *Harris v. Runnels,* 12 How. (U. S.) 79, the Supreme Court of the United States, said 'Before

> the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, the statute must be examined as a whole, to find out whether the makers of it meant that a contract in contravention of it should be void, or that it was not to be so'." (p. 801.)

It is submitted that in prescribing a criminal penalty and civil liability for damages, the Legislature intended to set forth all of the penalties and effects of Section 1858. As stated before, the requirements that the storage charges be stated on the receipt is to protect the holder of the receipt against secret liens. The penalties set forth fully accomplish this. First, a criminal penalty is provided as a punishment and a deterrent; then a civil remedy is given to the injured party. What more is needed? Certainly there is nothing in what is sought to be accomplished which demands that a warehouse receipt—which often circulates freely and is the basis of many commercial transactions—be void.

After arguing that these receipts are void, appellant found himself in an uncomfortable position. He had run squarely against the rule that the Courts will take no action with respect to an illegal contract, but will leave the parties in the position in which it finds them. Desperately he snatched at those few cases—mostly dealing with the sale of securities in violation of the Corporate Securities Act—in which the Court decreed restitution for two reasons: First, if it had not done

so, the evil that the statute was seeking to prevent would have been accomplished; Second, because special equities existed in favor of the plaintiff.

Neither of these conditions is present here. It would be ridiculous to contend that it was necessary for appellant to recover the value of these goods, in order to carry out the purpose of a statute requiring the rate of storage to appear on the face of receipts. Appellant stands in no better position than his predecessor in interest. The bankrupt had signed the warehousing contract containing the storage rates and had accepted the receipts based thereon. These receipts were pledged to secure loans. Appellant does not contend that the bankrupt did not receive these sums for use in connection with its business. Nor is it claimed that any creditor was injured or prejudiced. Obviously the bankrupt's estate will be unjustly enriched to the extent of any judgment recovered.

Appellee submits (a) that the Legislature intended the penalties and remedies of Section 1858(f) to provide the sole effect of a violation of that section; (b) that receipts omitting a requirement of subdivision (b) thereof are valid warehouse receipts.

POINT 2.

(a) THE PHRASE "SUBJECT TO LIEN FOR STORAGE, HANDLING, INSURANCE AND OTHER CHARGES AS PER CONTRACT AND LEASE WITH THE INDUSTRY SERVED" WHICH APPEARED ON THE FACE OF THE RECEIPT WAS SUFFICIENT IN ITSELF TO SATISFY THE STATUTORY REQUIREMENTS.

It has been established that substantial compliance with the statutory requirements governing the contents of a warehouse receipt is sufficient. (*Standard Bank of Canada v. Lowman,* 1 F. (2d) 935 (D.C. Wash., 1924).

In *Boas v. De Pue Warehouse Co.,* 69 C. A. 246 (1924) (Sup. Ct. denied petition for hearing December 15, 1924), this rule was applied by a California Court to the statement of storage charges. In answer to the claim that a warehouseman's lien for charges extended only to those charges which were mentioned on the receipt, the Court said (pp. 249-250):

> "A warehouseman does not lose his lien for charges by failure to fully insert them in a non-negotiable receipt. The purchaser of a non-negotiable instrument is put upon notice that there may be a lien for charges not mentioned therein. * * *.
>
> One to whom a receipt has thus been transferred acquires thereby as against the transferor the title to the goods subject to the terms of any agreement with the transferor * * *.
>
> A warehouseman issuing a non-negotiable receipt which contains, as here, a recital that the goods stored are subject to a lien for charges is entitled to a lien to the extent of such charges,

> even though the amount is not stated in the receipt (Western Bank v. Marion Distilling Co., 89 Ky. 91 (5 S.W. 458)), and such recital is sufficient to put the assignee upon notice of the warehouseman's lien (Security Bank v. Minneapolis Cold Storage Co., 55 Minn. 101 (56 N.W. 582)).''

It is noteworthy that in reaching its decision the Court ignored Section 1858 and discussed only the Uniform Act. If the Court had felt that Section 1858 was applicable this receipt would have clearly violated subsection (c) thereof. It is submitted that this case requires a holding that the receipts in issue are valid.

In the *Minneapolis Cold Storage* case, cited above by the Court, the receipt said that the goods were deliverable ''upon the payment of charges'' and then left the amounts blank. The Court held that this gave the transferee of the receipt sufficient notice of the possibility of charges to support the warehouseman's lien (See also: *Stein v. Rheinstrom,* 50 N. W. 827 (Minn. 1891)).

It seems clear that the Courts view the statement of storage charges on the receipt as a means of protecting a receipt holder, especially a negotiable receipt holder, from secret liens. The above cases demonstrate that wording which is more indefinite than that contained on the face of the Lawrence receipts will accomplish this purpose. Certainly if a California Court will uphold a lien for charges which are not stated, it can scarcely be contended that a

failure to set forth these charges invalidates the receipt.

It is submitted that the phrase "subject to lien for storage, handling, insurance and other charges as per contract and lease with the industry served" which appeared on the Lawrence receipt accomplishes the legislative purpose and satisfies the requirements of Section 1858 of the Civil Code.

(b) THE WAREHOUSING CONTRACT WHICH CONTAINED A DETAILED STATEMENT OF STORAGE RATES WAS INCORPORATED BY REFERENCE INTO THE RECEIPTS.

These receipts specifically state that the storage rates shall be those set forth in the contract and lease between Lawrence and "the industry served", which in this case is the C. A. Reed Furniture Company. It is well established that writings referred to in a contract shall be construed as part of the contract, 3 *Williston on Contracts,* Rev. Ed. 1801; 17 *C.J.S.* 716. This doctrine has been applied to warehouse receipts (*Kirkpatrick v. Lebus,* 211 S. W. 572 (Ky. 1919)). It is also well established that parol evidence is acceptable to explain a warehouse receipt *(Starr v. Beerman,* 189 N.Y.S. 174 (App. Div. 1921)) and that the previous course of dealings between the parties is competent evidence as to the meaning of receipts *(Blackburn Trading Corp. v. Export Fr. Forwarding Co.,* 198 N.Y.S. 133 (App. Div. 1923)).

This receipt is in the form usually found in field warehousing. The very nature of this type of opera-

tion makes it impossible to charge an ordinary tariff rate. Conditions vary in each industry. The amount of work necessary to preserve the stored commodities, the number and salaries of the employees and several other factors make it necessary to evolve a more flexible rate structure. It has not been the custom to list these charges on the receipt. It is a basic rule that established custom and usage is admissable to aid statutory construction (*People v. Borda,* 105 C. 636 (1895)).

Appellee submits that this reference to and incorporation of the contract in the receipt satisfied the statutory requirements.

PART III.

THERE IS NO ISSUE OF AN ILLEGAL PREFERENCE IN THIS ACTION.

Appellant's brief (page 14), attempts to interject the issue of a bankruptcy preference into this action. We submit that this is wholly unwarranted and unjustified. Appellant's complaint states one, and only one, cause of action against Lawrence Warehouse Company. A cause of action for conversion resulting from the alleged invalidity of these receipts. There are no facts alleged from which an action for an illegal preference could even be implied. The issue would raise many complicated questions of fact and law which are not part of this action in any way.

We submit that the preference issue not being raised in the pleadings, and not having been tried in

the lower Court, is not before this Court in any form and that so much of appellant's brief as deals with it should be disregarded.

CONCLUSION.

Appellee submits that appellant has attempted to establish a cause of action by falling into the double error of misconstruing an inapplicable statute. The decision in this case is governed by the Uniform Warehouse Receipts Act not by Section 1858 of the Civil Code, which was repealed by the later comprehensive codification of warehouse law. There is no doubt but that these receipts are valid under the cases construing the Uniform Act. As we have shown, however, appellant cannot prevail even under Section 1858 with whose provisions the receipts complied and which does not make receipts issued in violation thereof void.

It is respectfully submitted that the judgment of the lower Court should be affirmed.

Dated, San Francisco,
April 15, 1948.

Respectfully submitted,
W. R. Wallace, Jr.,
W. R. Ray,
Joseph Martin, Jr.,
Williamson & Wallace,
Attorneys for Appellee.

No. 11844

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the ESTATE OF C. A. REED FURNITURE COMPANY (a Corporation), Bankrupt,

Appellant,

vs.

CALIFORNIA BANK (a Corporation) and LAWRENCE WAREHOUSE COMPANY (a Corporation),

Defendants,

LAWRENCE WAREHOUSE COMPANY (a Corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

CRAIG & WELLER,
McLAUGHLIN, McGINLEY & HANSON,
JAMES A. McLAUGHLIN,
650 South Spring Street, Los Angeles 14,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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Appellee.

APPELLANT'S REPLY BRIEF.

The weakness of appellee's position is demonstrated by each of the following circumstances:

(1) Appellee fails to deal specifically with any of the authorities cited in appellant's brief.

(2) Apparently recognizing the force of appellant's authorities, appellee cites a few decisions which are either from other jurisdictions that follow a minority rule, or which contain dictum that has been repudiated by the applicable precedents in this state.

(3) Appellee seeks to obscure the California rule as to invalidity by citing cases from other jurisdictions where

the violation of a criminal statute was not even before the court.

(4) Appellee urges the size of the warehousing business and its apparent custom of noncompliance with these statutes as a reason for judicially repealing them. It does not demonstrate why the statutes could not have been complied with.

Appellee Does Not Sustain Its Claim of Repeal by Implication.

In Part I of Appellee's Brief, appellee argues that the Warehouse Receipts Act (Act 9059, General Laws*) superseded and therefore repealed the Civil Code sections by implication. To support this argument, appellee refers to certain requirements in the two statutes which are different.

"Difference" is a two-edged sword. It can just as easily be used as an argument that the later act was not intended to supersede the earlier, but that the two were to exist together and supplement each other. It is not *difference,* but *inconsistency* in the nature of *repugnance* that effects a repeal by implication.

Appellee has pointed out no such inconsistency between the two statutes. Even if appellee had found inconsistencies on other requirements, that would not repeal the consistent portions of the first legislation which were not dealt with in the later legislation.

Here both laws require that the warehouse receipt show the rate of storage charges. The Warehouse Receipts

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*References to the General Laws and Codes shall mean those of California unless otherwise indicated.

Act provides no criminal penalty for violation of this provision, but section 1858f of the Civil Code does.

Appellant's argument, if sound, would likewise require the nullification of sections 578, 580 and 581 of the Penal Code. These sections impose heavy criminal penalties on warehousemen and others who issue false or misleading warehouse receipts.

Such an argument would also result in invalidity of section 3440.5 of the Civil Code, which provides:

> "Section 3440 of this code shall not apply to goods in a warehouse where a warehouse receipt has been issued therefor by a warehouseman as defined in the Warehouse Receipts Act, and a copy of such receipt is kept at the principal place of business of the warehouseman and at the warehouse in which said goods are stored. Such copy shall be open to inspection upon written order of the owner or lawful holder of such receipt."

It is important to note that this section was first enacted in 1939 while the case of *Heffron v. Bank of America (infra)* was pending and was amended in its present form in 1941, a year after the decision in the *Heffron* case. It is therefore clear that the state legislature did not at that late date regard it as necessary to embody all requirements as to valid warehouse receipt transactions in the Warehouse Receipts Act. That act expressly makes the provisions of section 3440 of the Civil Code applicable to pledges and transfers of warehouse receipts unless a copy of each such receipt is kept for inspection at the warehouse where the goods are stored.

If the legislature had construed the case of *Heffron v. Bank of America,* 113 F. (2d) 239, as meaning that all

legislation relating to the issuance or transfer of warehouse receipts must be in the Warehouse Receipts Act, it would have put that statute there, instead of in the Civil Code.

The only point the *Heffron* case decided was that section 3440 of the Civil Code, requiring the recordation of a seven-day notice of any transfer of a stock in trade, did not apply to a transfer of warehouse receipts evidencing such stock in trade. The Court correctly recognized the distinction between commercial paper such as warehouse receipts and the property represented thereby. The Court also noted that sections 37 to 43 of the Warehouse Receipts Act completely governed the procedure for transferring such receipts and defined the rights acquired in such transfers. The Court had no other alternative than to hold that provisions of another statute repugnant to such sections were repealed by implication, if and to the extent that they affected the transfer of property evidenced by warehouse receipts.

Just as the provisions of section 3440.5 of the Civil Code now operate concurrently with the Warehouse Receipts Act, so also do the provisions of sections 1858b and 1858f remain effective in that they superimpose upon the requirement of both laws a criminal penalty for violation of the requirement that the receipt disclose its rate of storage charges.

Further evidence of the legislative intent to have several different laws operate concurrently is that sections 1231 to 1258 of the Agricultural Code (enacted in 1933) set forth detailed requirements as to the warehousing of agricultural products. These sections impose requirements as to the contents of such warehouse receipts not contained in the Warehouse Receipts Act, yet it was clearly

not the legislative intent to repeal the provisions of the Warehouse Receipts Act which were not repugnant to these sections.

The authorities that govern this question are set forth on pages 19 and 20 of Appellant's Opening Brief. The rule is admirably stated in 23 California Jurisprudence* (Statutes), section 85, at page 698, as follows:

> "Whenever there is an irreconcilable conflict or repugnancy between the provisions of two acts, so that upon any reasonable construction they cannot stand together, the earlier act is repealed by the later one, without any repealing clause, an intention to repeal the prior statute being necessarily implied in such case. But, in view of the presumption against implied repeals, and the recognized duty of the courts to give effect, as far as possible, to all statutes not expressly repealed, it is settled that the inconsistency or repugnancy between the two must be irreconcilable and very clear in order than an implied repeal may be said to exist. Repugnancy between two acts in principle merely forms no reason why both may not stand."

The following brief comments will show the inapplicability of the authorities relied upon by appellee:

Commercial Nat. Bank v. Canal-Louisiana B. & T. Co., 239 U. S. 520, 60 L. Ed. 417, did not involve the repeal of any statutes by implication. It involved the question whether decisions prior to the adoption of the Uniform Warehouse Receipts Act should govern the transaction where they were contrary to the express provisions of

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*This work was erroneously referred to in Appellant's Opening Brief as 22 California Jurisprudence, instead of Vol. 23.

that Act. The Court properly held that the Act governed where there was an inconsistency with any prior law.

Jewett v. City Transfer & Storage Co., 128 Cal. App. 556, involved the question whether sections 3051 and 3052 of the Civil Code conferring liens upon repairmen and governing the method of foreclosure applied so as to excuse a warehouseman from giving the notice of sale required by section 33 of the Warehouse Receipts Act. The Court first expressed a doubt as to whether those sections even applied to warehousemen. It then went on to say that they could not be relied upon to excuse compliance with the Warehouse Receipts Act. We do not contend that sections 1858b and 1858f excuse any compliance with the Warehouse Receipts Act. We do assert that there is nothing in that Act which excuses compliance with the two above mentioned Civil Code sections.

Neither *Salt River Valley Water Users Ass'n v. Peoria Ginning Co.,* 231 Pac. 415 (Ariz.), nor *Mason v. Exporters & Traders Compress Co.,* 94 S. W. (2d) 758 (Tex.), embody any issue similar to or useful in this case. Their selection may evidence the desperateness of appellee's position.

Equitable Trust Co. v. A. C. White Lumber Co., 41 F. (2d) 60 (D. C., Idaho, 1930), has been dealt with in our opening brief. It should be noted that this case wholly nullifies the effect of statutes requiring the storage rates to be shown on the face of the receipt. It says the failure to abide by such statutes in no way effects the negotiability or validity of the receipt. If this is true, what may be

the purpose of retaining such statutes on the books? That Court fell into the error of following some scattered decisions where it was the warehouseman that was seeking to take advantage of his own wrong by asserting the invalidity of the receipts which he had issued. Neither that case, nor any of the cases cited therein, involved a receipt issued or executed in violation of a criminal statute, so they could not be applicable to our case for any purpose.

The last statement likewise disposes of the other cases cited on pages 11, 12 and 13 of Appellee's Brief. Two of these cases, however, deserve further mention.

Woldson v. Davenport Mill & Elevator Co., 13 P. (2d) 478 (Wash., 1932), did involve a penal provision making it an offense to fail to state that the goods were owned by the warehouseman. When the receipts were issued the warehouseman did not own the goods, but it later acquired these receipts from the owner. The warehouse company was the one seeking to take advantage of this asserted defect, but the Court held that there was nothing in the statute requiring a validly issued negotiable receipt to be cancelled merely because the warehouse company had later acquired such receipt. The Court said there was no violation of the criminal statute.

Bank of California Nat. Ass'n v. Schmalz, 9 P. (2d) 112 (Ore., 1932), is another case where a warehouse company unsuccessfully tried to take advantage of its own failure to strictly comply with the law in failing to number the receipts consecutively. There was no criminal statute involved.

Appellee Cites No Applicable Authority to Sustain the Asserted Validity of the Receipts.

The cases cited by appellee are beneficial in that they bring into focus the fallacy on which it proceeds.

Appellee first cites *Eberhard v. Pacific Southwest L. & M. Corp.,* 215 Cal. 226, where the Court said at page 228:

> "The inhibitions of the Corporate Securities Act (Deering's Gen. Laws, Supp. 1929, p. 3287, Act 3814) against sales of securities to the public without permits are meant to protect the public from imposition and deception—not primarily to benefit the seller. The seller and the purchaser are therefore in no sense *in pari delicto* where this provision is violated. The fact that the transaction may be void at the behest of the purchaser is not to allow a premium for real wrong done by the seller. The fundamental maxim that 'no one can take advantage of his own wrong' (sec. 3517, Civ. Code), and other kindred principles, immediately recur to the mind."

The parallel between the Corporate Securities Act and section 1858f of the Civil Code is exact. They both direct their prohibitions at and lay the penalties upon the issuer. If appellee were seeking to assert its own failure to comply with this statute as a basis for avoiding a liability under the receipts, the *Eberhard* decision would preclude this, but it does not preclude persons other than the issuer from asserting the invalidity.

The next case cited by appellee was decided prior to the Civil War. This is the case of *Harris v. Runnels,* 12 How. 79, 13 L. Ed. 901, in which the Court held that the violation of a statute requiring a certificate as to slaves brought into Mississippi did not preclude the seller from recovering the purchase price of such slaves.

In a similar but later case involving liquor instead of slaves, the Supreme Court in *Miller v. Ammon,* 145 U. S. 421, 36 L. Ed. 759, at 762, applied the rule which it has since followed, and which is directly contrary to the rule followed in the *Runnels* case.

The faint echo of the *Runnels* case which was voiced in a dictum in an early California case has been completely discredited by later decisions. In *Bentley v. Hurlburt,* 153 Cal. 796 (cited and relied upon by appellee), the question was whether the seller of lots could recover the unpaid balance of the purchase price when he had not complied with the statute forbidding the sale of lots referred to in an unrecorded subdivision map. The Court pointed out that there were two conflicting rules on the effect of illegality, citing *Berka v. Woodward,* 125 Cal. 119, as sustaining one rule, and *Harris v. Runnels (supra)* as authority for the contrary. It then said that it was unnecessary to select between these because the seller had in fact complied with the statute. Since then the case of *Berka v. Woodward* has become one of the leading and most frequently cited cases in this state on the effect of illegality. It is true that a few states such as Oregon and Montana have disapproved the doctrine of *Berka v. Woodward,* but it is definitely the law in California.

The case of *Uhlmann v. Kin Dow,* 193 Pac. 435 (Ore.) (cited by appellee), is an example of the minority rule that is followed in a few states as are also the cases of *Furlong v. Johnston,* 204 N. Y. Supp. 710, and *Adams Express Co. v. Darden,* 286 Fed. 61 (6th Cir.), also cited by appellee.

The Policy of the Statute Is Not Fulfilled by What Appellee Calls "Substantial Compliance."

The receipts do not even refer to other documents as containing the *rate* of storage charges. They do refer to these other documents for information as to the lien rights which the warehouseman claims. If such a receipt complies with the statute, then the effect of the statute is completely nullified. Instead of having the rate of charges shown on its *face,* the receipt would be sufficient as long as it told where information as to storage charges could be found. Obviously anyone going to the warehouse company's office and inspecting its books and records could always ascertain the rate of charges. Anyone knows that, without being so advised by the receipt. It is the policy of the law to render unnecessary such inquiries and investigations, by requiring the warehouse company to make such disclosure on the *face* of the receipt and not in some other instrument which the warehouse company may have.

The following comments will demonstrate the inapplicability of the cases cited by appellee under that subdivision in its brief:

In *Standard Bank of Canada v. Lowman,* 1 F. (2d) 935 (D. C., Wash., 1924), it was contended that the rights of the pledgee of warehouse receipts were invalid as against an innocent purchaser of the goods represented by such receipts, for the reason that the warehouse receipts did not comply with the statute governing their issuance. In answer to this, the Court said that warehouse receipts need not be in any particular form, but it then proceeded to state the essential statutory requirements, and in concluding this statement, it said that the evidence showed that the receipts substantially complied with all those requirements. There was no failure to comply with any of the

statutory requirements, the only question being whether one unit of fundible goods was equivalent to any other unit.

The case of *Boas v. De Puc Warehouse Co.*, 69 Cal. App. 246, did not involve the interpretation or effect of sections 1858b and 1858f of the Civil Code. That case is discussed and its doctrine disapproved in the case of *San Angelo Wine etc. Co. v. South End Warehouse Company,* 19 Cal. App. (2d) 749, wherein the Court said at page 751:

> "*Boas v. De Puc Warehouse Co.*, 69 Cal. App. 246, 250 (230 Pac. 980), presented the question whether, after the withdrawal of a part of a single bailment, a lien was retained on the residue for the entire amount of charges on the original quantity. In holding that the lien of the entire amount was retained, the court adopted a passage from 27 Ruling Case Law, page 1007, in which incidentally it was said that a warehouseman's lien is specific and not general. So far as any issue before the court was concerned, that statement was merely *dictum*. The language drawn from the volume cited was a statement of the common-law rule; and on page 1008 attention is directed to the fact that under the uniform warehouse acts the lien is extended to all such charges and claims as are enumerated in section 27 of our act, as amended in 1933."

The Court in the *San Angelo* case then went on to state that the liens of warehousemen were fully covered by sections 27 and 30 of the Warehouse Receipts Act.

It is clear from a reading of the *Boas* case that the existence or effect of sections 1858b and 1858f were never

brought to the attention of that Court, and to the extent that the decision can be regarded as a decision on anything, it seems to have been disapproved by the opinion in the *San Angelo* case.

None of the Minnesota decisions cited on page 22 of Appellee's Brief involved any criminal statute, and there is therefore no parallel between those cases and the case at bar.

On page 23, appellee cites four authorities to the effect that writings referred to in one contract shall be construed as part of that contract. This general rule is not applicable where the statute requires something to be set forth on the face of the receipt. A noteworthy example of a similar requirement is the requirement of Rule 223 of the Rules and Regulations of the Securities and Exchange Commission which requires, among other things, the issuer of exempt securities to include a paragraph on the first page of the prospectus to the effect that the securities have not been registered because they are believed exempt from such requirement. It could just as consistently be argued that such rule would be complied with by a reference on the first page of the prospectus to another instrument or document containing such statement.

Appellant does not controvert the rule that one contract may incorporate another by reference, but appellant does challenge appellee's claim that the statute requiring something to appear on the face of a document is complied with by having it appear in some other document.

There Is No Force to Appellee's Other Contentions.

Appellee seeks to dissipate the force of the rule as to invalidity by suggesting that the penal provisions of the Civil Code were aimed only at negotiable warehouse receipts, in spite of the plain language to the contrary.

Appellee also suggests that since the Act is not *malum in se* the receipts would not be void.

The contrary rule is stated in 6 Cal. Jur. (Contracts), page 105, as follows:

> "The general rule controlling in cases of this character is that, where a statute is passed for the protection of the public and not as a revenue measure, and it prohibits or attaches a penalty to the doing of an act, the act is illegal, and this, notwithstanding that the statute does not expressly pronounce it so. And a contract founded upon such an act is void. The statute is a prohibition of the law from entering into such a contract at all, and the illegality affects the whole transaction from its inception. And it is immaterial whether the thing forbidden is *malum in se* or merely *malum prohibitum*. Cases may be found holding a contrary doctrine; but an examination of those cases will, it has been said, show that the statutes upon which they are based generally do not prohibit, but merely impose a fine as an exclusive punishment. A statute of this character, prohibiting the making of contracts except in a certain manner, *ipso facto*, makes them void if made in any other way."

See additional authorities in Vol. 4, Ten-Year Supp. to Cal. Jur.

Conclusion.

The issue is not whether the Warehouse Receipts Act is being construed uniformly. It is why the uniform rule in this state as to invalidity of an illegal document should not apply.

The receipts being issued by appellee in violation of the criminal statute were void. They therefore conferred no rights upon the pledgee bank. (*Hollywood State Bank v. Wilde,* 70 Cal. App (2d) 103.) If appellee had held the merchandise covered by these receipts and interpleaded the pledgee bank and appellant, that pledgee could have established no rights as against appellant. This being true, appellee is liable for having delivered the merchandise to the wrong party.

Respectfully submitted,

CRAIG & WELLER,
MCLAUGHLIN, MCGINLEY & HANSON,
By JAMES A. MCLAUGHLIN,
Attorneys for Appellant.

No. 11,844

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of C. A. Reed Furniture Company (a Corporation), Bankrupt,

Appellant,

vs.

CALIFORNIA BANK (a Corporation), and LAWRENCE WAREHOUSE COMPANY (a Corporation),

Defendants,

LAWRENCE WAREHOUSE COMPANY (a Corporation),

Appellee.

ADDENDA TO BRIEF FOR APPELLEE.

W. R. WALLACE, JR.,
W. R. RAY,
JOSEPH MARTIN, JR.,
WILLIAMSON & WALLACE,
310 Sansome Street, San Francisco,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Defendants,

LAWRENCE WAREHOUSE COMPANY (a Corporation),

Appellee.

ADDENDA TO BRIEF FOR APPELLEE.

Act. 9059. Warehouse Receipts Act. [Stats. 1909, p. 437; Amended by Stats. 1919, p. 398; Stats. 1923, p. 676; Stats. 1931, p. 1501; Stats. 1933, p. 2398; Stats. 1937, p. 2472.]

An act to make uniform the law of warehouse receipts.

§ 1. Persons entitled to issue receipts. Warehouse receipts may be issued by any warehouseman.

§ 2. Contents of receipts: Liability for omission. Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms—

(a) The location of the warehouse where the goods are stored,

(b) The date or issue of the receipt,

(c) The consecutive number of the receipt,

(d) A statement whether the goods received will be delivered to the bearer, or to a specified person, or to a specified person or his order,

(e) The rate of storage charges,

(f) A description of the goods or of the packages containing them,

(g) The signature of the warehouseman, which may be made by his authorized agent,

(h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership, and

(i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of the terms herein required.

§ 3. Insertion of other conditions. A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not—

(a) Be contrary to the provisions of this act.

(b) In anywise impair his obligation to exercise that degree of care in the safekeeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

§ 4. Non-negotiable receipts. A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a non-negotiable receipt.

§ 5. Negotiable receipts. A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt is a negotiable receipt. No provision shall be inserted in a negotiable receipt that is non-negotiable. Such provision, if inserted, shall be void.

§ 6. Duplicates to be marked as such. When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to anyone who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt.

§ 7. Non-negotiable to be marked not negotiable. A non-negotiable receipt shall have plainly placed upon its face by the warehouseman issuing it, "non-negotiable," or "not negotiable." In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value supposing it to be nego-

tiable, may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable.

This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character.

§ 8. Rights of holder of receipt. A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with—

(a) An offer to satisfy the warehouseman's lien,

(b) An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt, and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal.

§ 9. Persons entitled to delivery of goods. A warehouseman is justified in delivering the goods subject to the provisions of the three following sections, to one who is—

(a) The person lawfully entitled to the possession of the goods, or his agent,

(b) A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper, or

(c) A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee.

§ 10. Liability for delivery to person not entitled. Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section and though he delivered the goods as authorized by said subdivision he shall be so liable, if prior to such delivery he had either

(a) Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or

(b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods.

§ 11. Liability on failure to take up negotiable receipt. Except as provided in section 36, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable to anyone who purchases for value in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman.

§ 12. Liability arising out of partial delivery. Except as provided in section 36, where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered he shall be liable, to anyone who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman.

§ 13. Alteration of receipt no excuse from liability: Fraudulent alteration. The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was

(a) Immaterial,

(b) Authorized, or

(c) Made without fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt, as they were before alteration.

Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase.

§ 14. Delivery when receipt is lost: Order of court. Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties to be approved by the court to protect the warehouseman from any liability or expense, which he or any person by such delivery may incur by reason of the original receipt remaining outstanding. The court may also in its discretion order the payment of the warehouseman's reasonable costs and counsel fees.

The delivery of the goods under an order of the court as provided in this section, shall not relieve the warehouseman from liabilities to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

§ 15. Word "duplicate" operates as warranty. A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of the issue of the duplicate, but shall impose upon him no other liability.

§ 16. Title of warehouseman. No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt.

§ 17. Rights of warehouseman when goods claimed by two or more persons. If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for non-delivery of the goods, or as an original suit, whichever is appropriate, require all known claimants to interplead.

§ 18. Justification for refusal to deliver. If someone other than the depositor or person claiming under

him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. If such adverse claimant shall not bring suit and serve summons on the warehouseman within forty-eight hours after the service of notice of his adverse claim, such failure shall act as a complete abandonment of such adverse claim.

§ 19. **Limitation on rights of third persons.** Except as provided in the two preceding sections and in sections 9 and 36, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt.

§ 20. **Liability for nonexistence or misdescription of goods.** A warehouseman shall be liable to the holder of a receipt, issued by him or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of warehouse receipts, for damages caused by the non-existence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a state-

ment that the goods are said to be goods of a certain kind, or that the packages containing the goods are said to contain goods of a certain kind, or by words of like purpose, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor. [Amended by Stats. 1923, p. 676.]

§ 21. Injury to goods. A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care.

§ 22. Duty to keep goods separate. Except as provided in the following section, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and redelivery of the goods deposited.

§ 23. Mingling of fungible goods. If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common, and each depositor shall be entitled to such portion

thereof as the amount deposited by him bears to the whole.

§ 24. **Care of mingled goods.** The warehouseman shall be severally liable to each depositor for the care and redelivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate.

§ 25. **Surrender of receipt prerequisite to attachment.** If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court.

§ 26. **Creditor's right to injunction.** A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction or otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process.

§ 27. **Warehouseman's lien.** Subject to the provisions of section 30, a warehouseman shall have a

lien on goods deposited by the owner or by the legal possessor of the property or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods, also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, coopering and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice, and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien. [Amended by Stats. 1919, p. 398; Stats. 1931, p. 1501; Stats. 1933, p. 2398.]

§ 28. Enforcement of lien. Subject to the provisions of section thirty, a warehouseman's lien may be enforced:

(a) Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted; and

(b) Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person was in legal possession of the goods when they were deposited. [Amended by Stats. 1919, p. 398.]

§ 29. Loss of lien. A warehouseman loses his lien upon goods—

(a) By surrendering possession thereof, or

(b) By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this act.

§ 30. Lien for storage charges. If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms of section 27, although the amount of the charges so enumerated is not stated in the receipt.

§ 31. Right to hold goods under lien. A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied.

§ 32. Remedies of warehouseman generally. Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor, for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay.

§ 33. Satisfaction of lien: Notice of sale: Sale at auction: Rights of claimants. A warehouseman's lien for a claim which has become due may be satisfied as follows:

The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain—

(a) An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due,

(b) A brief description of the goods against which the lien exists,

(c) A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue shall be paid on or before the day mentioned, not less than ten days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail, and

(d) A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

Sale at auction. In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale

is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein.

From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods.

Rights of claimants. At any time before the goods are sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this act, to the possession of the goods on payment of charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit.

§ 34. Perishable goods etc.: Notice to remove: Sale. If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability or explosive nature will be liable to injure other property, the warehouseman may give

such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of a failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section. [Amended by Stats. 1933, p. 2398.]

§ 35. Other remedies for enforcement of lien. The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property.

§ 36. Cessation of liability on lawful sale. After goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor, or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable.

§ 37. Negotiation of negotiable receipts: Delivery. A negotiable receipt may be negotiated by delivery—

(a) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the bearer, or

(b) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where, by the terms of a negotiable receipt, the goods are deliverable to bearer or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the indorsement of such indorsee.

§ 38. Same: Indorsement. A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are, by the terms of the receipt, deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiations may be made in like manner.

§ 39. Transfer of receipt not negotiable by delivery. A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee.

A non-negotiable receipt cannot be negotiated, and the indorsement of such a receipt gives the transferee no additional right.

§ 40. Persons entitled to negotiate a receipt. A negotiable receipt may be negotiated by any person in possession of the same, however such possession may have been acquired if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of such person or if at the time of negotiation the receipt is in such form that it may be negotiated by delivery. [Amended by Stats. 1923, p. 676.]

§ 41. Rights acquired by negotiation. A person to whom a negotiable receipt has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value, and

(b) The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him.

§ 42. Rights acquired by transfer of receipt. A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the receipt is non-negotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt.

Prior to the notification of the warehouseman by the transferor or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

§ 43. **Same: Right to compel indorsement.** Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

§ 44. **Warranties of transferor.** A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants—

(a) That the receipt is genuine,

(b) That he has a legal right to negotiate or transfer it,

(c) That he has knowledge of no fact which would impair the validity or worth of the receipt, and

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a receipt the goods represented thereby.

§ 45. Liability of indorser. The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations.

§ 46. Mortgagee's warranty. A mortgagee, pledgee or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quantity or quality of the goods therein described.

§ 47. Rights of bona fide negotiator. The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was deprived of the possession of the same by loss, theft, fraud, accident, mistake, duress, or conversion, if the person

to whom the receipt was negotiated, or the person to whom the receipt was subsequently negotiated, paid value therefor in good faith without notice of the breach of duty, or loss, theft, fraud, accident, mistake, duress or conversion. [Amended by Stats. 1923, p. 677.]

§ 48. Subsequent negotiation. Where a person having sold, mortgaged, or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiations.

§ 49. Seller's lien not to defeat rights of purchasers. Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transitu. Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation.

§ 50. Fraudulent issue of receipt: Penalty. A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his control at the time of issuing such receipt, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

§ 51. Issuance of receipt containing false statements: Penalty. A warehouseman, or any officer, agent, or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 52. Fraudulent issue of duplicates: Penalty. A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "duplicate," except in the case of a lost or destroyed receipt after proceedings as provided for in section 14, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprison-

ment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

§ 53. Issuance of receipt not stating warehouseman's ownership: Penalty. Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents, or servants who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be guilty of a crime, and upon conviction, shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 54. Delivery of goods covered by outstanding receipt. A warehouseman, or any officer, agent, or servant of a warehouseman who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt the negotiation of which would transfer the right to the possession of such goods is outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, shall, except in the cases provided for in sections 14 and 36, be found guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 55. Negotiation of receipt for mortgaged goods: Penalty. Any person who deposits goods to which he has no title or upon which there is a lien or mortgage, and who takes for such goods a negotiable re-

ceipt which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment, not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

§ 56. Law governing matters not covered by act. In any case not provided for in this act, the rules of law and equity, including the law-merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern.

§ 57. Interpretation of act. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 58. Definitions and distinctions. (1) In this act, unless the context of subject matter otherwise requires—

"Action" includes counterclaim, set-off, and suit in equity.

"Delivery" means voluntary transfer of possession from one person to another.

"Fungible goods" means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit.

"Goods" means animate or inanimate chattels or merchandise in storage or in the custody of a warehouseman, or which has been or is about to be stored or deposited in the custody of a warehouseman.

"Holder" of a receipt means a person who has both actual possession of such receipt and a right of property therein.

"Order" means an order by indorsement on the receipt.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership of two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee or as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Receipt" means a warehouse receipt.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

"Warehouseman" means a person lawfully engaged in the business of storing goods for profit.

(2) A thing is done "in good faith" within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not. [Amended by Stats. 1937, p. 2473.]

§ 59. **Prior transactions.** The provisions of this act do not apply to receipts made and delivered prior to the taking effect of this act.

§ 60. **Repeal of conflicting acts.** All acts or parts of acts inconsistent with this act are hereby repealed.

§ 61. **Title of act.** This act may be cited as the Warehouse Receipts Act.

CIVIL CODE SECTIONS 1858-1858f.

Warehousemen

§ 1858. Warehouse-receipts, when must not be issued. A warehouseman, wharfinger, or other person doing a storage business must not issue any receipt or voucher for any merchandise, grain, or other product or thing of value, to any person purporting to be the owner thereof, nor to any person as security for any indebtedness or for the performance of any obligation, unless such merchandise, grain, or other product, commodity, or thing has been, in good faith, received by such warehouseman, wharfinger, or other person, and is in his store or under his control at the time of issuing his receipt; nor must any second receipt for any such property be issued while a former receipt for any part thereof is outstanding and uncanceled. [Added by Stats. 1905, p. 612.]

§ 1858a. Property not to be removed without consent in writing. No warehouseman, wharfinger, or other person must sell or encumber, ship, transfer, or remove beyond his immediate control any property for which a receipt has been given, without the consent in writing of the person holding such receipt plainly indorsed thereon in ink. [Added by Stats. 1905, p. 612.]

§ 1858b. Warehouse-receipts, classification and effect of. Warehouse-receipts for property stored are of two classes: first, transferable or negotiable; and second, non-transferable or non-negotiable. Under the first of these classes the property is transferable by indorsement of the party to whose order such receipt was issued, and such indorsement is a valid transfer of the property represented by the receipt, and may be in blank or to the order of another. All warehouse-receipts must distinctly state on their face for what they are issued and its brands and distinguishing marks and the rate of storage per month or season, and, in the case of grain, the kind, the number of sacks, and pounds. If a receipt is not negotiable, it must have printed across its face in red ink, in bold, distinct letters, the word "non-negotiable." [Added by Stats. 1905, p. 612.]

§ 1858c. Indorsement on negotiable receipt of property delivered. If a negotiable receipt is issued for any property, neither the person issuing it nor any other person into whose care or control the property comes must deliver any part thereof without indorsing on the back of the receipt, in ink, the amount and date

of the delivery; nor can he be allowed to make any offset, claim, or demand other than is expressed on the face of the receipt, when called upon to deliver any property for which it was issued. [Added by Stats. 1905, p. 612.]

§ 1858d. Non-negotiable receipts and their effect. If a non-negotiable receipt is issued for any property, neither the person issuing nor any other person in whose care or control the property comes must deliver any part thereof, except upon the written order of the person to whom the receipt was issued. [Added by Stats. 1905, p. 612.]

§ 1858e. Liability for loss by fire. No warehouseman or other person doing a general storage business is responsible for any loss or damage to property by fire while in his custody, if he exercises reasonable care and diligence for its protection and preservation. [Added by Stats. 1905, p. 613.]

§ 1858f. Penalties and liabilities. Every warehouseman, wharfinger, or other person who violates any of the provisions of sections eighteen hundred and fifty-eight to eighteen hundred and fifty-eight e, inclusive, is guilty of a felony, and, upon conviction thereof, may be fined in a sum not exceeding five thousand dollars or imprisonment in the state prison not exceeding five years, or both. He is also liable to any person aggrieved by such violation for all damages, immediate or consequent, which he may have sustained therefrom, which damages may be recovered by a civil action in any court of competent jurisdiction, whether the offender has been convicted or not. [Added by Stats. 1905, p. 613.]

No. 11844

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of C. A. REED FURNITURE COMPANY, a corporation, Bankrupt,

Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

APPELLANT'S PETITION FOR REHEARING.

McLAUGHLIN, McGINLEY & HANSON,
JAMES A. McLAUGHLIN,
FRANK C. WELLER,
1224 Bank of America Building, Los Angeles 14,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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APPELLANT'S PETITION FOR REHEARING.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant above named respectfully petitions for a rehearing after decision rendered by this court on the 12th day of May, 1948, affirming the judgment of the District Court of the United States for the Southern District of California, Central Division.

The grounds of such petition are as follows:

1. On the date that the decision was rendered appellant's counsel found additional California authorities directly determining that the Warehouse Receipts Act did not repeal the Civil Code section relating to warehousing. By the time appellant's counsel were able to request permission to submit such authorities, the above decision had already been made.

2. The decision is contrary to the law as established by the decisions of the appellate courts of the State of California.

3. The decision rests upon three decisions, none of which can be regarded as controlling precedents in the State of California for the following reasons:

(a) It does not appear that the Supreme Court of the United States, in *Commercial National Bank v. Canal-Louisiana B. & T. Co.,* 239 U. S. 520, was speaking of repeal of any statutes by implication. The question there was whether the case law existing prior to the adoption of the Warehouse Receipts Act was modified by that act to the extent that it was inconsistent. The case did not involve the question of the repeal of any statute by implication.

(b) The effect of the case of *Heffron v. Bank of America,* 113 F. (2d) 240, must be regarded as having been nullified by the enactment of Section 3440.5 of the Civil Code. That enactment destroys the rule in the *Heffron* case that the Warehouse Receipts Act alone governs. It repudiates the doctrine of that case to the effect that legislation relating to warehousing cannot validly exist outside of, or separate and apart from, the Warehouse Receipts Act.

(c) The case of *Jewett v. City Transfer & Storage Co.,* 128 Cal. App. 551, is neither an authority for the proposition that legislation relating to warehousing does not exist outside of the Warehouse Receipts Act, nor is it an authority for the contention that earlier legislation not repugnant to the Warehouse Receipts Act was repealed by that Act.

The Validity and Continued Efficacy of the Civil Code Sections Has Been Sustained on Numerous Occasions by the California Courts.

Due perhaps partially to deficiencies in the texts dealing with warehousing, appellant's counsel overlooked some of the most important decisions pertaining to this question. These decisions are directly contrary to the decision of this court.

In *Lewis-Simas-Jones Co. v. C. Kee & Co.*, 27 Cal. App. 135, plaintiff sued the defendant for the purchase price of potatoes sold by plaintiff while they were stored in a public warehouse. Plaintiff did not transfer any warehouse receipts to the defendant, but gave the defendant a written order on the warehouseman, directing delivery of the potatoes to the defendant. Later the defendant repudiated the transaction and claimed that there had been no delivery of the potatoes.

The court concerned itself with the question whether there had been a symbolic delivery by giving the defendant the written order on the warehouseman. It rejected the appellant's contention that the Warehouse Receipts Act of 1909 exclusively governed the transfer of warehoused merchandise. Under Sections 37-43 of that Act, it was necessary for plaintiff to have transferred his warehouse receipts to the defendant to accomplish a transfer or delivery of the potatoes, and defendant had not done this. The court said that the law as it existed prior to the Warehouse Receipts Act and as it was embodied in Section 1858d of the Civil Code, permitted the delivery of the warehoused property "upon the written order of the person to whom the receipt was issued."

This is a direct decision to the effect that the Uniform Warehouse Receipts Act did not repeal the Civil Code

sections, and in referring to the Uniform Warehouse Receipts Act, the court said, at page 138:

> "Upon the reading of the entire act we do not find that there is anywhere expressed in it an intention to require a departure from the rule laid down in the earlier cases and remaining unchanged up to the time of its passage, making the written order of a depositor of goods in a warehouse, upon which there has been issued a non-negotiable receipt, sufficient to pass, by its delivery, receipt, and acceptance, the title and symbolical possession of personal property not capable of manual delivery so as to satisfy the statute of frauds, and entitled the seller to recover from the buyer its purchase price."

In *Norton v. Lyon Van & Storage Co.,* 9 Cal. App. (2d) 199, plaintiff's action was predicated upon the warehouse company's wrongful refusal to return his goods, and the question was whether the warehouse company had lawfully enforced its lien thereon for storage. The plaintiff on his appeal contended that the Warehouse Receipts Act providing for notice of sale in the enforcement of the lien was unconstitutional. The court first said that it saw no reason for not sustaining the constitutionality of the Act, insofar as the provisions relating to warehousemen's liens were concerned. It then went on to say, at page 204:

> "Even in the absence of the Warehouse Receipts Act, a depositary for hire has a lien for storage charges and expenses of sale (Civ. Code, secs. 1856, 3051), and in the event of nonpayment may sell the property deposited. (Civ. Code, sec. 3052.)"

The sections 3051 and 3052 referred to in such opinion as being valid and applicable are the same sections that the earlier case of *Jewett v. City Transfer & Storage Co.,*

supra, held were repealed by the Warehouse Receipts Act. This later case, therefore, is directly contrary to the statement in the *Jewett* case and is an additional authority for the proposition that both enactments exist concurrently insofar as their provisions are not directly repugnant.

Section 1856 of the Civil Code, referred to in the above opinion relates to the lien of a depositary for storage, and the recognition of the continued operation of this section is also a direct decision that the Civil Code sections relating to warehousing were not repealed by the enactment of the Warehouse Receipts Act.

In *A. Widemann Co. v. Digges,* 21 Cal. App. 342, the court affirmed a judgment in favor of the plaintiff upon a sales agreement for the sale of warehoused grain. In answer to the contention that there had been no timely tender of delivery on the plaintiff's part, the court said, at page 348:

> "The transfer of negotiable warehouse receipts is a symbolical delivery of the goods called for by them, and passes the title thereto as effectually as if an actual delivery had been made. (Civ. Code sec. 1858b.)"

This transaction took place in 1910, a year after the adoption of the Uniform Warehouse Receipts Act, and the decision of the Supreme Court was on February 28, 1913, four years after the adoption of the Uniform Warehouse Receipts Act.

In *Chatterton v. Boone,* 81 A. C. A. 1108 (decided October 20, 1947), the court affirmed a judgment against the defendant warehouse company for damages resulting from a fire on the theory that the warehouse company had failed to exercise reasonable care in the protection

and preservation of the goods after the fire, as required by Section 1858(e) of the Civil Code.

In *Northwestern M. F. Assn. v. Pacific Co.,* 187 Cal. 38, in determining the liability of the warehouse company for destruction of goods by fire, the court referred to and quoted the provisions of Section 1858(e) of the Civil Code as governing the care to be exercised.

In *Defense Supplies Corporation v. Lawrence Warehouse Company,* District Court, N. D. California, S. D., 67 Fed. Supp. 16, the defendant warehouse company was sued along with other defendants for damages to tires which had been warehoused, and the court referred to both the provisions of the Civil Code and the Warehouse Receipts Act as concurrently governing the liability. On page 20, the court said:

> "If Capitol Chevrolet Company, the agent of Lawrence Warehouse Company, failed to use reasonable care for the preservation of plaintiff's goods whereby the damage was caused or contributed to, Lawrence Warehouse Company is liable to plaintiff. California Warehouse Receipts Act, Sec. 21, Gen. Laws, Act 9059; California Civil Code, Sec. 1858e."

The above cited cases all demonstrate that the courts continue to regard the Civil Code sections dealing with warehousing as concurrently effective along with the Warehouse Receipts Act. The last three of those cases deal with the care to be exercised by warehousemen as defined by Section 1858e of the Civil Code, but as is pointed out in the *Defense Supplies Corporation* case, Section 21 of the Warehouse Receipts Act also deals with the subject of care, and yet the courts have not interpreted this as a repeal by implication of the Civil Code sections dealing with the care to be exercised by warehousemen.

The decision in the case at bar is contrary to all of the above cited cases. It is also in conflict with the rule of the authorities dealing with repeal by implication which we cited on pages 19 and 20 of Appellant's Opening Brief, and on page 13 of Appellant's Reply Brief.

The California State Legislature Has Expressly Repudiated the Doctrine of Heffron v. Bank of America, Supra, by the Enactment of Section 3440.5 of the Civil Code.

During the time that such case was pending on appeal, Section 3440.5 of the Civil Code was enacted, and subsequent to the decision in the *Heffron* case in 113 F. (2d) 240, the legislature amended Section 3440.5 so that the section must be regarded as a direct repudiation of the *Heffron* decision. The decision in the *Heffron* case was that Section 3440, relating to the transfer of stock in trade in bulk, did not pertain to such goods when they were stored in a warehouse and warehouse receipts were issued therefor. This court said in the *Heffron* case that insofar as Section 3440 might pertain to warehoused goods, the same was repealed by the Warehouse Receipts Act. That ruling was predicated upon the proposition that the Warehouse Receipts Act since its enactment was the exclusive source of the law relating to warehousing.

The rule of that decision, if it were still the law, would operate to destroy Section 3440.5 just as effectively as it nullified Section 3440 of the Civil Code.

The Case of Jewett v. City Transfer & Storage Co., Supra, Does Not Sustain the Proposition That Sections 1858 to 1858f, Civil Code, Were Repealed by the Warehouse Receipts Act.

The *Jewett* case does not even deal with these sections. It deals with Sections 3051 and 3052 of the Civil Code relating to storage liens and the enforcement thereof. The headlight of that decision is the court's observation that Section 35 of the Warehouse Receipts Act did not preclude other remedies allowed for the enforcement of liens against personal property. After making such observation, one would logically assume that the court would have proceeded to hold that Section 3052 of the Civil Code would provide another remedy if the procedure therein was in any way different from the procedure specified under Section 33 of the Warehouse Receipts Act. Conversely, the court said that since the remedied were the same; that is, both providing for sale of the goods after notice, Section 3052 of the Civil Code was superseded by Section 33 of the Warehouse Receipts Act.

If the decision is to be regarded as sound at all, it must be predicated upon the ground that Section 33 specifies a particular type of notice of sale that must be complied with, and to the extent that any earlier legislation specified a different type of notice, such earlier legislation cannot be regarded as relaxing the requirements of the later legislation embodied in the Warehouse Receipts Law. That is all there is to the decision in the *Jewett* case. It should not be forgotten that the *Jewett* case is directly

contrary to the *Norton* case, *supra,* which deals with the same statutes.

We have no situation here that is parallel to that existing in the *Jewett* case. In the first place, the requirement of Section 1858b of the Civil Code that warehouse receipts show the rate of storage charges is not inconsistent or repugnant to the requirements of subsection (e) of Section 2 of the Warehouse Receipts Act. Both enactments require that the warehouse receipts show the rate of storage charges, but the earlier enactment in the Civil Code specifies a criminal penalty for violation thereof.

We are not dealing with a situation where the early enactment makes one requirement and the subsequent enactment specifies a requirement that is repugnant to the requirement of the first statute. We are not even dealing with a situation where appellee can show compliance with either of these enactments. In order to have a situation parallel to the *Jewett* case, appellee would have to show that the two enactments embodied inconsistent requirements, and that appellee had complied with the requirements of the Warehouse Receipts Act.

Conclusion.

In the interests of clarifying the law as evidenced by the state court decisions and Section 3440.5 of the Civil Code on the one hand, and the *Heffron* case on the other, we respectfully submit that a rehearing should be granted. Legislation which has not been expressly repealed should not be cast aside lightly, particularly where the Legisla-

ture has continued that legislation on the books over these many years, and where the decisions of the California courts have consistently recognized its vitality.

Respectfully submitted,

CRAIG, WELLER & LAUGHARN and
MCLAUGHLIN, MCGINLEY & HANSON,
By JAMES A. MCLAUGHLIN,
Attorneys for Appellant.

Certificate of Counsel.

The undersigned counsel for the appellant above named hereby certifies that in his judgment the foregoing petition for rehearing of the above named appellant is well founded and that such petition is not interposed for delay.

JAMES A. MCLAUGHLIN.